Supreme Court, U.S.

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

TRI-STATE RUBBISH, INC.,

Petitioner,

v.

CITY OF AUBURN, MAINE, and
MID-MAINE WASTE ACTION CORPORATION,

Respondents.

**Petition For A Writ Of Certiorari
To The Supreme Judicial Court
Of The State Of Maine**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a municipal ordinance violate the dormant Commerce Clause by restricting trade in solid waste in order to hoard articles of interstate trade for use as a source of fuel in a municipally owned incinerator converting solid and reusable waste to energy?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

Cases iv

Constitutional Provisions v

Statutes v

Federal Statutes v

Maine Statutes v

Treatises and Articles vi

Miscellaneous vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

A. Background 5

B. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 11

I. Hoarding Of Waste To Subsidize The Operation Of A Municipal Disposal Facility Contravenes National Policy Preferring Reuse And Recycling Alternatives Over Incineration 11

TABLE OF CONTENTS – Continued

Page

II. There Is Strong Divergence Of Opinion Among Lower Federal Courts And The State Courts Whether Flow Control Laws Violate The Commerce Clause 16

III. Flow Control Ordinances Should Not Be Given Special Status Simply Because They Are The Result Of State Action 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

City of Auburn v. Tri-State Rubbish, Inc., 630 A.2d 227 (Me. 1993) 2, 8

C & A Carbone, Inc. v. Town of Clarkstown, Docket No. 92-1402, October Term, 1992 13

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 12, 20

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12, 17, 20

Containers Corp. of Carolina v. Meckleburg County, No. 92-CV-154-MV slip op. at 4 (W.D.N.C. June 14, 1992) 14

Department of Environmental Protection v. Emerson, 563 A.2d 762 (Me. 1989) 10

Steven D. DeVito, Jr., Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991) Aff'd., 947 F.2d 1004 (1st Cir. 1991) 17

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S. Ct. 2019 (1992) 12

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 19, 20

J. Filiberto Sanitation, Inc. v. State of N. J. Dept. of Environmental Protection, 857 F.2d 913 (3rd Cir. 1988) 14, 17

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 16-17, 19

TABLE OF AUTHORITIES – Continued

Page

Town of Clarkstown v. C & A Carbone, Inc., 182 A.D.2d 213, 687 N.Y.S.2d 681 (1992)..... 20

Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables Unlimited Services, Inc., U.S.S.C. Docket No. 93-1133 ..... 8, 9, 10, 11, 13, 19

Tri-State Rubbish, Inc. v. Town of Gray, 632 A.2d 134 (Me. 1993)..... 8

Waste Systems Corp. v. County of Martin, Minnesota, 985 F.2d 1381 (8th Cir. 1993).....13-14, 17

CONSTITUTIONAL PROVISIONS:

Maine Constitution article VIII, pt. 2, sec. 1..... 4

United States Constitution, Art. I, sec. 8, cl. 3; Commerce Clause 2

STATUTES:

Federal Statutes:

28 United States Code Annotated § 1257 (West 1993)..... 2

62 United States Code Annotated § 6901 et seq., Resource Conservation and Recovery Act (West 1993)..... 12

Maine Statutes:

30-A Maine Revised Statutes Annotated § 3001 (West Supp. 1993) 2-3

38 Maine Revised Statutes Annotated § 1304-B (West 1989 and Supp. 1993)..... 3, 6, 14

TABLE OF AUTHORITIES – Continued

Page

38 Maine Revised Statutes Annotated § 1305(1) (West Supp. 1993) 3-4

38 Maine Revised Statutes Annotated § 2101 (West Supp. 1993) 4

38 Maine Revised Statutes Annotated § 2132(3) (West Supp. 1993) 14

TREATISES AND ARTICLES:

Ann R. Mesnikoff, Disposing of the Dormant Commerce Clause Business; Keeping Waste at Home 76 Miami Law Review 1219, 1230-1231 (1992) 6

City of Auburn, Flow Control Ordinance..... *passim*

United States Environmental Protection Agency ("EPA"), *The Solid Waste Dilemma: An Agenda for Action* at 6 (1989)..... 11, 15

United States Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States:* 1990 Update, Executive Summary at ES-5 (1990) 12

MISCELLANEOUS:

Maine Rules of Civil Procedure Rule 62(g) 9

No. _____

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CITY OF AUBURN, MAINE, and
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**Petition For A Writ Of Certiorari
To The Supreme Judicial Court
Of The State Of Maine**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court was rendered on February 15, 1994, denying Petitioner's motions for a stay pending appeal of the Order of the Superior Court of the State of Maine, dated February 8, 1994, granting Respondents' motion for a preliminary injunction and directing Petitioner to deliver solid waste generated in the City of Auburn to Mid-Maine Waste Action Corporation for incineration and/or disposal.

The Decision of the Maine Supreme Judicial Court is unreported and is reproduced at page 1a of the Appendix

to this Petition ("Pet. App."). The Order of the Superior Court of the State of Maine is unreported and is reproduced at Pet. App. 2a.

The Order of the Superior Court of the State of Maine rests, in part, on a previous Decision of the Maine Supreme Judicial Court in this case. That decision is recorded at No. AND-92-352, Decision No. 6625 (August 5, 1993), is reported at 630 A.2d 227 (Me. 1993) and is reproduced at Pet. App. 10a.

JURISDICTION

The Decision of the Maine Supreme Judicial Court was entered on February 15, 1994. The grant of a preliminary injunction is decreed to be a final judgment under Maine law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257 (West 1993) on the basis that the decision below is an interlocutory order finally determining issues of constitutional law and causing irreparable injury to the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Art. 1, sec. 8, cl. 3, provides in relevant part: "The Congress shall have the Power . . . to regulate Commerce . . . among the several States . . . "

2. The Maine home rule statute, 30-A Me.Rev.Stat.Ann. § 3001 (West Supp. 1993) provides:

Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or functions granted to the municipality by the Constitution of Maine, general law or charter.

1. **Liberal construction.** This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purpose.

2. **Presumption of authority.** There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.

3. **Standard of preemption.** The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

4. **Penalties accrue to municipality.** All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

3. The Maine flow control enabling legislation, 38 Me.Rev.Stat.Ann. § 1304-B (West 1989 and Supp. 1993), is reproduced at Pet. App. 26a.

4. The Maine solid waste disposal mandate statute, 38 Me.Rev.Stat.Ann. § 1305(1) (West Supp. 1993) states as follows:

> Disposal services. Each municipality shall provide solid waste disposal services for domestic and commercial solid waste generated within the municipality and may provide these services for industrial wastes and sewage treatment plant sludge.

5. The State solid waste management hierarchy statute, 38 Me.Rev.Stat.Ann. § 2101 (West Supp. 1993), reads:

> 1. Priorities. It is the policy of the State to plan for and implement an integrated approach to solid waste management, which shall be based on the following order of priority:
>
> A. Reduction of waste generated at the source, including both amount and toxicity of the waste;
>
> B. Reuse of waste;
>
> C. Recycling of waste;
>
> D. Composting of biodegradable waste;
>
> E. Waste processing which reduces the volume of waste needing land disposal, including incineration; and
>
> F. Land disposal of waste.

6. The Maine Constitution's home rule provision, Me. Const. art. VIII, pt. 2, sec. 1, reads:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

7. The City of Auburn, Maine's Solid Waste Flow Control and Recycling Ordinance is reproduced at Pet. App. 42a.

STATEMENT OF THE CASE

This case presents a challenge under the Commerce Clause to a local ordinance which hoards all "acceptable" solid waste generated in the municipality for the benefit of a municipal owned waste to energy plant.

A. Background.

The Petitioner, Tri-State Rubbish, Inc. ("Tri-State"), is in the business of collecting solid waste from customers in the City of Auburn and nearby communities. Separated recyclable waste is sold by Tri-State to brokers and recycling processors. Non-recyclable waste is taken by Tri-State to landfills or facilities that burn the waste to generate power. (Pet. App. 4a and 12a)

Tri-State has been enjoined from engaging in this business in the City of Auburn as the result of a state court action brought by the City of Auburn and Mid-Maine Waste Action Corporation ("MMWAC"). MMWAC is a non-capital stock, non-profit corporation created by an inter-local agreement among 12 municipalities, including the City of Auburn. MMWAC's purpose is to own, lease and operate a solid waste management program for the benefit of member communities. MMWAC has built and is operating a waste to energy facility. The facility was financed by bonded indebtedness. The action seeks

to enforce the City of Auburn's Solid Waste Flow Control Ordinance ("the Flow Control Ordinance") requiring that all "solid waste"[1] generated in the City must be disposed of at MMWAC. Pet. App. 3a-4a. Flow Control Ordinance Article I, §§ 1.3.9, 1.3.11 and Article II, § 2.1.1, Pet. App. 44a-45a.

Ordinances of this type are generally known as "flow control" ordinances. See, Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Business; Keeping Waste at Home* 76 Miami L. Rev. 1219, 1230-1231 (1992) (Student note). The purpose is to provide an assured flow of waste to waste to energy plants in order for them to operate efficiently and to generate sufficient return to repay the cost of construction. See, 38 Me.Rev.Stat.Ann. § 1304-B(1) (West 1989).

MMWAC is the City of Auburn's designated facility for the disposal of solid waste pursuant to a Waste Handling Agreement. (Pet. App. 11a) At times relevant to this case, MMWAC charged $75 per ton to handle solid waste delivered by commercial haulers, substantially more than

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[1] "Solid Waste" under the Flow Control Ordinance, includes useless, unwanted or discarded solid material with insufficient liquid content to be free flowing, including by way of example, and by limitation, rubbish, garbage, commercial and industrial waste, scrap materials, junk refuse, demolition and construction debris and landscape refuse, but shall not include sludge from air and water pollution facilities, septic tank sludge or agricultural or hazardous waste or other materials which are deemed unacceptable for incineration at MMWAC pursuant to a Waste Handling Agreement between Auburn and MMWAC. Flow Control Ordinance Article 1, §§ 1.3.9, 1.3.11, Pet. App. 44a-45a.

the $35 per ton charged at a competing, privately owned facility. *Id.* Under its agreement with MMWAC, the City of Auburn is required to deliver to MMWAC all "acceptable waste" generated in the City or pay a financial penalty equal to 125% of the fee which MMWAC would have charged for the disposal of the diverted waste, *Id.* The Waste Handling Agreement has a 24 year term and is non-cancelable, *Id.*

B. Proceedings Below.

The City of Auburn filed a land use citation complaint against Tri-State in the Maine District Court (Lewiston). The case was removed by Tri-State to the Superior Court. The City of Auburn filed an amended complaint seeking an injunction compelling disposal of solid waste at MMWAC, a $100 per day penalty for violation of the Flow Control Ordinance, and indemnification of Auburn for any liability to MMWAC under the Waste Handling Agreement. Tri-State then claimed that the Flow Control Ordinance was invalid under the Commerce Clause (Pet. App. 49a), the Due Process Clause and State law. MMWAC joined the case as a plaintiff-intervenor seeking enforcement of the Flow Control Ordinance.

Auburn and MMWAC brought a motion for summary judgment on all claims. After a hearing, the Superior Court entered summary judgment in favor of Auburn and MMWAC on all counts. Tri-State then appealed to the Supreme Judicial Court of Maine, sitting as the Law Court. The appeal was heard and the Law Court vacated

the summary judgment finding that the ordinance discriminated against interstate commerce insofar as recyclable waste was concerned. The Law Court remanded the case for further hearing on the following issues: (i) Tri-State is to demonstrate that it has the ability to separate recyclables from solid waste, and (ii) Auburn and MMWAC have the burden to demonstrate valid reasons for the Flow Control Ordinance other than economic protectionism and the unavailability of reasonable alternatives. Pet. App. 23a.

Subsequent to the decision of the Maine Law Court in the *Auburn* case, the Maine Law court decided the matter of *Tri-State Rubbish, Inc. v. Town of Gray*, 632 A.2d 134 (Me. 1993); Pet. App. 50a. This appeal considered whether solid waste flow control laws violated the dormant Commerce Clause generally and not just with respect to recyclable waste. Again, the Maine Law Court found solid waste flow control laws to discriminate against interstate commerce, and that it is the burden of the municipality to show that (i) the ordinance was adopted for reasons other than economic protectionism and (ii) there are no other reasonable alternatives for the disposal of waste. The Town of Gray has petitioned this court for a Writ of Certiorari to the Maine Supreme Judicial Court for review of the decision. See, *Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables Unlimited Services, Inc.*, U.S.S.C. Docket No. 93-1133.

On remand of this case to the Superior Court, and after the decision of the Law Court in the *Gray* case, Auburn and MMWAC filed a motion for a preliminary injunction enjoining Tri-State from the delivery of solid waste generated in Auburn to any facility other than

MMWAC. The Superior Court found that the first threshold issue on remand was whether Tri-State had the ability to separate recyclable materials from solid waste, and only then could the Commerce Clause by applicable. Pet. App. 4a-5a. The Superior Court rejected, without comment, the prior decisions of the Law Court in this case and in the *Gray* case which found that solid waste flow control ordinances are facially discriminatory and violative of the dormant Commerce Clause. The Superior Court found that the "Defendants [sic] (Tri-State) have the burden of proof in the Commerce Clause issue, yet their opposition to plaintiff's [sic] (Auburn and MMWAC) motion presents no facts regarding recycling. Without some significant showing that the defendant (Tri-State) will be able to support Commerce Clause claims as indicated in the Law Court opinion, plaintiffs' [sic] (Auburn and MMWAC) reasonable likelihood of success on the merits appears established for purposes of this motion." The Superior Court did not consider the finding in the *Gray* case that all solid waste is subject to the dormant Commerce Clause and not just recyclable waste. The Superior Court refused to require Auburn and MMWAC to most a bond to indemnify Tri-State against dangers sustained by wrongful interference with its business activities.

Again, Tri-State appealed to the Law Court and moved pursuant to Rule 62(g) of the Maine Rules of Civil Procedure for a stay of the preliminary injunction pending appeal. This motion was denied by a single Justice of the Law Court without comment. Pet. App. 1a.

This petition challenges the implied findings of the Superior Court, which were left intact by the Law Court,

that the Solid Waste flow Control Ordinance does not burden interstate trade and its validity should be determined on a liberal balancing of interests test.

In this case, the Maine Law Court has found that all solid wastes are articles of interstate commerce. The grant of the preliminary injunction by the Superior Court and the refusal by the Law Court to stay the injunction renders moot the decisions previously obtained by Tri-State in this case and the *Gray* case that flow control ordinances are discriminatory *per se* and their validity is determined by a strict scrutiny test. The instant decision of the Maine Law Court creates confusion in this case as to the nature of the burden on interstate trade and the proof that must be offered at trial. It seems highly likely that further state court proceedings will result in the grant of a permanent injunction impinging the same constitutional right to engage in trade.

The preliminary injunction and the denial of stay constitute appealable interlocutory decisions under Maine law. See, *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 765-766 (Me. 1989). The status of this case has a substantial adverse impact upon the operation of Tri-State's business. Continuation of the preliminary injunction may cause irreparable injury to Tri-State.

The continuing mandated delivery of waste to MMWAC erodes national policy for the reuse of waste materials and the encouragement of recycling activities. Continuation of the preliminary injunction imposes a substantial restriction on interstate trade.

The Town of Gray and Regional Waste Systems have petitioned for a Writ of Certiorari to the Maine Supreme

Judicial Court in *Town of Gray v. Tri-State Rubbish, Inc.*, supra. The issues raised in the *Gray* petition are virtually identical questions of fact and law as are presented in this Petition from the position of waste hauler rather than from the municipality's position as set forth in *Gray*. The *Gray* decision by the Maine Law Court resulted in an opposite outcome for Tri-State applying a strict scrutiny standard. In the event that certiorari is granted in the *Gray* case, the interests of the parties and the court will be advanced. Judicial resources will be conserved if both this case and the *Gray* case are heard contemporaneously.

REASONS FOR GRANTING THE WRIT

I. Hoarding Of Waste To Subsidize The Operation Of A Municipal Disposal Facility Contravenes National Policy Preferring Reuse And Recycling Alternatives Over Incineration.

The right of municipalities to take control of and to hoard solid waste has become a new issue in the United States reflecting the new-found value of solid waste as a source of reusable materials, compost and energy. A conflict has arisen between the traditional view that it is the exclusive province of municipalities and the modern reality that valuable waste has created new industries across America based on the premise that its value can be extracted.

Approximately 180 million tons of municipal solid waste is generated annually in the United States. See, United States Environmental Protection Agency ("EPA"), *The Solid Waste Dilemma: An Agenda for Action* at 6 (1989).

The EPA has concluded that more than half of this solid waste could be re-used: 40% paper and paperboard; 8.5% metals; 8% plastics; and 7% glass. See, United States Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States:* 1990 Update, Executive Summary at ES-5 (1990). In 1988, less than 13.1% of municipal solid waste was recovered. *Id.*, at ES-6, n.9.

Congress has determined that the recovery of waste is a matter of national concern, and declared that municipal solid waste contains valuable resources which can be reused, thereby conserving scarce, virgin materials which are being buried in landfills. This situation was addressed by the Resource Conservation and Recovery Act, 62 U.S.C.A. § 6901 et seq. Congress provided financial assistance to states adopting waste disposal plans including provisions for substantial reuse and recovery of materials from solid waste. As a result entire industries have developed for the purpose of transporting, remanufacturing and marketing of newsprint and paper products, cans, glass, plastics, metals and other materials obtained from waste prior to its being burned or buried. Also, substantial interstate trade has developed in the transport of waste and residual waste to facilities generating energy from waste.

This Court is quite familiar with the trade and movement of waste in interstate commerce having dealt with these issues in *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 112 S. Ct. 2019 (1992); and *Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. 2009 (1992). Similar issues have been presented in the matter

of *C & A Carbone, Inc. v. Town of Clarkstown*, now pending in this Court (Docket No. 92-1402, October Term, 1992), and in the Petition for Certiorari in the *Gray* case.

In response to federal incentives and parochial need, local jurisdictions have constructed expensive, capital intensive facilities to build "designated facilities" for the disposal of waste. These facilities compete with private facilities for solid waste used as a raw material or fuel. The financial interest of municipalities in these facilities has motivated Auburn and other communities to hoard waste in order to dispose of waste at lower costs. Flow control ordinances have been adopted to embargo solid waste and to preserve it for the exclusive use of the municipal disposal facilities.

The purpose of flow control ordinances is only to subsidize designated facilities with a guaranteed supply of fuel thus eliminating the need to run a cost efficient, competitive plant. In this case, MMWAC charges a "tipping fee" of $75 per ton or more than 200% greater than the $35 per ton fee charged by its private competitor.[2]

A recent study by a New York public interest group found that New York residents subject to flow control pay an average of 22% more to dispose of waste than those residents not subject to flow control. Other recent decisions prove the trend. *Waste Systems Corp. v. County of*

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[2] MMWAC voted on February 18, 1994 to increase its "tipping fee" from the present $80 per ton to $174 per ton. The new fee is 274% greater than at the time this suit was filed, and is 500% greater than the price charged by private incinerators competing in Maine. $174 is believed to be the highest "tipping fee" charged by any waste to energy plant in the United States.

Martin, Minnesota, 985 F.2d 1381, 1387 (8th Cir. 1993) (flow controlled cost is $72 per ton versus $30 per ton at a competitive facility); *J. Filiberto Sanitation, Inc. v. N. J. Dept. of Environmental Protection*, 857 F.2d 913, 916 (3rd Cir. 1988) (flow controlled tipping fee of $100 per ton versus $30 per ton at a competitive facility); *Containers Corp. of Carolina v. Meckleburg County*, No. 92-CV-154-MV slip op. at 4 (W.D.N.C. June 14, 1992) (flow control disposal at $37.50 per ton versus $29.50 at a competitive facility).

As this case demonstrates so clearly, flow control does not necessarily result in the highest and best use of the waste. Once incinerated, the reusable materials are lost. Maine has established a hierarchy for waste disposal and incineration is preferred only over landfilling. See 38 Me.Rev.Stat.Ann. § 2101 (West Supp. 1993). Auburn and MMWAC disregard the State hierarchy in order only to support their financial investment in the waste to energy plant.

Maine has recognized the negative impact upon recycling created by flow control ordinances. As 38 Me.Rev.Stat.Ann. § 2132(3) (West Supp. 1993), Maine prohibited the inclusion of corrugated cardboard and paper in calculating the amount of municipal recycling required by State law. Secondly, at 38 Me.Rev.Stat.Ann. § 1304-B(4-A)(c), the Maine Legislature abrogated exclusive supply contract provisions to the extent that they interfere with municipal recycling programs by limiting the waste available for recycling.

The EPA has recognized that flow control laws are counter-productive. These laws have restructured the availability of paper for recovery and reuse. See *The Solid Waste Dilemma*, supra, at 3, D-6.

Forcing a business to transport waste to a designated facility for incineration when there are other, less expensive and usually better alternatives available is clearly discriminatory, contrary to State and federal policy, and an obstruction of interstate trade. There is no material difference between this case and the hypothetical situation in which a city forces businesses to rent office space in a city owned building or forcing residents to attend a municipal clinic for health services. Hoarding of waste denies municipal residents and businesses the right to direct their waste to higher and better use at a lower cost to them and society in general. Private and other public businesses are denied access to this necessary resource.

The conflict between private industry providing a myriad of waste disposal and reuse options and a municipality's hoarding of waste to subsidize a municipal disposal facility needs the attention of this Court. There is an inherent conflict between the exercise of police power for trash control and rights of business to engage in commerce.

II. There Is Strong Divergence Of Opinion Among Lower Federal Courts And The State Courts Whether Flow Control Laws Violate The Commerce Clause.

Twenty-six states are believed to have authorized flow control ordinances.[3] A number of jurisdictions have considered the validity of these ordinances and the results vary widely. The differences in the decisions seem to reflect opposing analytical approaches to the question of the applicability of the Commerce Clause. No consistent legal principle has evolved in the consideration of the constitutionality of these ordinances.

Some courts have found the impact on interstate commerce to be de minimis, and have applied the balancing of interests test outlined in *Pike v. Bruce Church, Inc.*,

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[3] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406(31)); Florida (Fla. Stat. Ann. § 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. ch. 65, para. 5/11-19-1); Indiana (Ind. Code §§ 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, 1304-B(2)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2003a, 2203b); Virginia (Va. Code Ann. § 15.1-28-01); Washington (Wash. Rev. Code §§ 36.58.040, 35.21.210); West Virginia (W. Va. Code § 16-26-16); Wisconsin (Wis. Stat. § 159.13(3), (11)).

397 U.S. 137 (1970). Others, including Maine, have found flow control laws to be protectionist measures discriminating against and creating a burden upon interstate commerce. In the latter line of cases, the courts have required a showing that the ordinances were not adopted for economic protectionism and there are no other, reasonable alternatives available to achieve the public objective. See, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); Pet. App. 23a and insert Gray at pg. 6.

The Third Circuit in *J. Filiberto Sanitation, Inc. v. State of N. J. Dept. of Environmental Protection*, supra, found that flow control laws rationally control dumping with no burden on interstate commerce and applied the *Pike* balancing test. The First and Eighth Circuits have applied the so-called strict scrutiny test in *Steven D. DeVito, Jr., Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I. 1991) Aff'd., 947 F.2d 1004 (1st Cir. 1991); and *Waste Systems Corp. v. County of Martin*, supra.

As noted above, the Maine Law Court found that flow control ordinances do create a burden on interstate commerce, and required applications of the strict scrutiny test. However, on remand, the Superior Court disregarded the Maine Law Court finding of discrimination and required a threshold showing that interstate commerce was burdened. This led to the granting of a preliminary injunction based upon a balancing of interests test. Rather than follow its previous decisions, the Maine Law Court, without explanation, refused to stay the preliminary injunction. The implication to be drawn from the refusal to stay the preliminary injunction is that the Maine Law Court now adopts the balancing of interests test over the strict scrutiny test.

Tri-State, other commercial haulers, and municipalities seeking to build new disposal facilities to be financed in reliance upon flow control ordinances, all face the same problem. The shifting sands of the Commerce Clause analyses lead to confusion in the market place. The federal courts, and even the Maine courts, seem to adopt varying views about the degree of impact of flow control laws on commerce without any consistency or reference to precedent.

This case presents a suitable framework for this Court to define the legal principles affecting interstate trade in solid waste. The Auburn Flow Control Ordinance creates an embargo upon all solid waste generated in the community and requires that it be delivered to MMWAC for disposal. The economic consequences are clear. MMWAC charges at least $40 per ton more than competing facilities for the disposal of waste to the detriment of businesses engaged in commerce in Auburn. The Ordinance denies other energy plants, recyclers and processors from access to the waste/raw material that they need to conduct their businesses.

If Certiorari is granted, this Court will provide needed guidance on these important issues.

III. Flow Control Ordinances Should Not Be Given Special Status Simply Because They Are The Result Of State Action.

The decision of the Superior Court granting a preliminary injunction assumes that restricting the disposal of recyclable waste may impact the Commerce Clause, but restricting solid waste in general is not an issue in this

case. The Superior Court limited its analysis to recyclable waste and refused to consider the more broad impact upon the Commerce Clause which was discussed in the *Gray* case. The Superior Court found that the Flow Control Ordinance is presumptively valid and should be enforced to maintain an assured supply of waste to MMWAC in accordance with the Waste Handling Agreement between the City of Auburn and MMWAC.

The Superior Court, and the Maine Law Court on appeal from the grant of preliminary injunction, did not find that the Flow Control Ordinance placed any material burden on interstate commerce. In fact, the Flow Control Ordinance is facially discriminatory and obliterates interstate commerce in this commodity.

The embargo/flow control issue created by this case was considered by this Court in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949). New York passed a law prohibiting the transport of milk to out-of-state processors because it "deprived local markets of a supply needed during the short season." This Court found in *H.P. Hood* that the Commerce Clause prohibits action by one community to avoid competition by withholding articles of commerce from others. Similarly in *Pike*, 397 U.S. at 142, the Court found *per se* unconstitutional any requirement that processing be done in the home state when it could be done more efficiently elsewhere.

The Superior Court in this case found that the Flow Control Ordinance applies even-handedly to all commercial haulers operating in Auburn by stating:

> "The Court recognizes that the injunction it imposes may have some adverse impacts on the

> defendants' [sic] finances and manner of doing business. Those impacts should not be any different than the impacts of the ordinance as applies to all other commercial haulers collecting trash within the City of Auburn . . . " (Pet. App. 8a)

This analysis misses the point. This is the same logic applied by the State of New York in *Town of Clarkstown v. C & A Carbone, Inc.*, 182 A.D.2d 213, 687 N.Y.S.2d 681 (1992). It is the export restriction, not the impact on local business, that creates the burden on commerce. Prohibiting local business from entering interstate commerce is a clear cut violation of the Commerce Clause regardless of the harmony within the community. See, *H.P. Hood*, 366 U.S. at 585.

It is not the interest of this community in the enforcement of its laws which is the driving force in this case. Auburn seeks only to prevent waste from going anywhere other than MMWAC. It is only the economic interests of Auburn and MMWAC that are at stake. Protection of these interests by illegitimate means is prohibited. See, *City of Philadelphia v. New Jersey*, 437 U.S. at 626-627; accord *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012.

By continuing the preliminary injunction, the Maine Law Court has given its imprimatur to the Law Court's logic. The failure to recognize the Commerce Clause prohibition against hoarding of goods for economic protectionism and the facial discrimination of the Ordinance was an error.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

RALPH A. DYER
Counsel for the Petitioner
477 Congress Street
Portland, ME 04101
207-773-6489

APPENDIX A

STATE OF MAINE
ANDROSCOGGIN, ss.

SUPREME JUDICIAL COURT SITTING AS THE LAW COURT
Law Docket No.
And-94-108

CITY OF AUBURN, *et al.*

VS.

TRI-STATE RUBBISH, INC.

ORDER

(Filed
Feb. 15, 1994)

Upon motion of appellant, pursuant to M.R.Civ.P. 62(g), for a stay pending appeal of the injunction ordered by the Superior Court,

It is ORDERED that the motion be, and it hereby is, DENIED.

Dated: February 15, 1994

For the Court,

/s/ David S. Roberts
Associate Justice

APPENDIX B

STATE OF MAINE
ANDROSCOGGIN, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-90-561

CITY OF AUBURN

Plaintiff

and

MID MAINE WASTE ACTION CORPORATION

Plaintiff/Intervenor

v.

TRI-STATE RUBBISH, INC. and GUY HART

Defendants

PRELIMINARY INJUNCTION AND ORDER

(Filed Feb. 8, 1994)

This case is before the court on several pending motions by plaintiff and defendant. The principal motion, by plaintiff City of Auburn, seeks to have defendants held in contempt or alternatively to impose a preliminary injunction upon the defendants. As a result of the Law Court opinion in *City of Auburn v. Tri-State Rubbish, Inc.*, 630 A.2d 227 (Me. 1993), which vacated a prior judgment of this court, there is no clearly outstanding order upon which to base a contempt determination. Accordingly, the contempt aspects of plaintiff's motion will be dismissed.

Defendants have filed a Motion to Compel Discovery which, in essence, seeks to invoke the provisions of the discovery rules requiring plaintiffs to supplement their previous responses to discovery. The court assumes that

the plaintiffs will respect their obligations under the discovery rules. Additionally, the court recognizes that discovery in this case is ongoing. So there is no confusion in the record, defendant's Motion to Compel Discovery will be dismissed.

Defendants have also filed a Motion for Rule 11 Sanctions, arguing that the contempt aspects of plaintiff's preliminary injunction motion are baseless and should be subject to sanctions. The court sees no significant prejudice in the defendants having to respond to both the contempt and preliminary injunction aspects of the plaintiff's motion. The primary focus of the dispute before the court for hearing is plaintiff's request for a preliminary injunction. The merits of that are being reached. It is not frivolous. Therefore, there is no basis for award of Rule 11 sanctions created by plaintiff's actions. The defendant's Motion for Rule 11 Sanctions will be denied.

Defendants have also filed a Motion to Dismiss Plaintiff's Motion to Show Cause or for Preliminary Injunction. That motion is really an opposition to the motion. It will be addressed together with the merits of the plaintiff's motion.

There is also pending plaintiff's Motion to Amend the Expedited Pretrial Order to extend expert designation deadlines and discovery deadlines. That motion is addressed by a separate agreed to Order.

There is no real dispute as to the facts underlying the preliminary injunction motion. The City of Auburn has solid waste disposal contracts with Mid Maine Waste Action Corporation ("MMWAC"). Pursuant to those contracts, the City of Auburn has adopted ordinances which

require that essentially all solid waste collected within the City of Auburn be delivered to MMWAC for disposal or recycling. Defendants Tri-State Rubbish and Guy Hart collect a substantial volume of solid waste from commercial enterprises within the City of Auburn. They dispose of that waste at facilities outside the City of Auburn, particularly a solid waste facility in Biddeford.

On July 20, 1992, this court (Delahanty, C.J.) granted the City's Motion for Summary Judgment and issued an injunction which barred defendants from collecting solid waste within the City of Auburn which was not then delivered to the MMWAC facility. On August 5, 1992, the court stayed enforcement of the injunctive aspects of that judgment contingent upon the defendants not soliciting or accepting any new business within the City of Auburn and posting a bond to cover potential penalties.

The Superior Court's summary judgment was vacated by the Law Court opinion. While vacating the judgment, the Law Court opinion generally cast aside Tri-State's many challenges to the legality and constitutionality of the Auburn Waste Disposal Ordinance. The only exception was its remand, for further development of the facts, on the question of whether the ordinance violated the Commerce Clause of the United States Constitution by improperly discriminating against interstate commerce as to the recyclable materials. The Law Court noted that:

> "Because the facts of this case require us to address only the removal of recyclables from the solid waste stream, leaving intact the requirement that non-recyclable waste must be delivered to MMWAC, on remand, Tri-State must

demonstrate that it has the capacity to separate the recyclables and deliver the remaining waste to MMWAC."

Thus, the matter was remanded to address only a very narrow issue, with the burden on Tri-State to demonstrate certain facts which could trigger application of Commerce Clause principals for analysis of the waste disposal ordinance.

The record before this court for consideration of the preliminary injunction motion does not provide any significant basis upon which the court could conclude that Tri-State is making any significant attempt to identify, separate and develop markets for recyclables as addressed in the Law Court comment and following footnote.

Criteria for consideration of preliminary injunction requests are well established. The party seeking a preliminary injunction must demonstrate to the court that:

1. They will suffer irreparable injury if the injunction is not granted,

2. Their injury outweighs any harm which granting the relief would inflict upon the defendant,

3. The public interest would not be adversely affected by granting the injunction, and

4. The plaintiff has demonstrated a reasonable likelihood of success on the merits.

Department of Environmental Protection v. Emerson, 563 A.2d 762, 768 (Me. 1989).

With a public agency the moving party seeking to enjoin a violation of law, the issue becomes even narrower. Where, as here, there is no dispute regarding the terminology of the law, its applicability to the facts of the case and the violation of the law, irreparable injury may be inferred from the violation itself. The court does not go behind the terms of the statute to question the legislative body's judgment on the irreparable injury analysis or to evaluate degrees of injury.

The same type of restrictive analysis applies to the balancing of the harms and public interest aspects of the preliminary injunction criteria, when the injunctive relief is sought by a public agency. Any individual violation of statute may not greatly harm the body politic enacting that statute. However, condoning such a violation because, on a balancing test, it might inconvenience a defendant more than continuing the violation might embarrass the body politic undermines the basic right of society that the laws will be fairly and equally enforced.

Such is particularly important in environmental regulation. Any individual violations may not greatly aggravate the problem sought to be addressed because each potential violator may only have minute impact on the general problem. Only the collective effect of violation of the law by significant numbers would undermine the purposes for which the law was enacted. However, allowing any violation to continue creates a favored position for the violator compared to the remainder of the citizenry who are in compliance with the law. Avoiding this favored position for the violator supports the irreparable injury, balancing and public interest elements of the injunction criteria.

Accordingly, the first three criteria for issuance of an injunction are met by the City of Auburn's demonstration that, without dispute, the terms of its ordinance apply to and are being violated by the defendants.

The key issue in this case is whether in the face of the defendants' constitutional challenge, the City can demonstrate a reasonable likelihood of success on the merits. The Law Court has in essence resolved, for the purposes of this case, all of the issues in favor of the City except the question of applicability of Commerce Clause analysis to the portion of Tri-State's trash flow which may be recyclable and subject to shipment in interstate commerce. Defendants' opposition to plaintiff's motion for preliminary injunction focuses not on the discrete recyclability and Commerce Clause issues highlighted in the Law Court's opinion, but on the asserted financial problems of MMWAC. Defendants have the burden of proof on the Commerce Clause issue, yet their opposition to plaintiff's motion presents no facts regarding recycling. Without some significant showing that the defendant will be able to support the Commerce Clause claims as indicated in the Law Court opinion, plaintiff's reasonable likelihood of success on the merits appears established for purposes of this motion.

Both plaintiff and defendant appear to assume that the requested injunctive relief involves a request for mandatory affirmative action, thus invoking the higher "clear likelihood" of success on the merits standard articulated in *Department of Environmental Protection v. Emerson, supra.* That standard is met in light of the failure of the defense to make any significant presentation on the recyclability and Commerce Clause issue. However, what the court

proposes to issue in this case is more in the nature of a prohibitory injunction than a mandatory one.

The court will waive the requirement of a bond in this case because the agency seeking an injunction is a municipality.

The court recognizes that the injunction it imposes may have some adverse impacts on the defendants' finances and manner of doing business. Those impacts should not be any different than the impacts of the ordinance as applied to all other commercial trash haulers collecting trash within the City of Auburn. However, to minimize any long term effects that this matter should proceed to final determination in this court as expeditiously as possible. The parties have now been on notice since the August Law Court opinion as to the remaining issues to be decided in this case. They should have been preparing accordingly. Discovery and arranging for experts should be proceeding toward completion by May 1, 1994.

Therefore the court Orders:

1. Defendant's Motion to Compel Discovery is DISMISSED.

2. Defendant's Motion for Rule 11 Sanctions is DENIED.

3. Defendant's Motion to Dismiss Plaintiff's Motion for Contempt and Preliminary Injunction is DENIED.

4. Plaintiff's Motion for Contempt, to the extent it seeks a contempt finding is DISMISSED.

5. Plaintiff's Motion for Preliminary Injunction is GRANTED.

Defendants Tri-State Rubbish, Inc. and Guy Hart, their officers, directors, agents, employees and any other person or corporation acting for or on their behalf are prohibited from collecting trash, solid waste and any and all other discarded materials within the City of Auburn, except that defendants may collect such materials within the City of Auburn only if those materials are delivered for disposal to the Mid Maine Waste Action Corporation facility in compliance with the provisions of the City of Auburn ordinances regarding solid waste disposal.

To allow readjustment of collection and delivery practices, this preliminary injunction shall not take effect until 5:00 p.m. on Friday, February 11, 1994.

The requirements for security pursuant to Rule 65(c), M.R.Civ.P., are waived because plaintiff is a public agency.

6. The clerk may incorporate this Order by reference in the docket with the notation: "Preliminary Injunction and Order dated February 8, 1994, is incorporated by reference in the docket per Order, Alexander, J."

Dated: February 8, 1994

/s/ Donald G. Alexander
Donald G. Alexander
Justice, Superior Court

A TRUE COPY
/s/ Sally A. Bourget
ATTEST

APPENDIX C

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. 6625
Law Docket No. And-92-352

CITY OF AUBURN, *et al.*

v.

TRI-STATE RUBBISH, INC.

Argued January 11, 1993
Decided August 5, 1993

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS and RUDMAN, JJ.

CLIFFORD, J.

Defendant Tri-State Rubbish, Inc. appeals from a summary judgment entered in the Superior Court (Androscoggin County, *Delahanty, C.J.*) in favor of plaintiff City of Auburn and plaintiff-intervenor Mid-Maine Waste Action Corporation (MMWAC). The judgment enjoins Tri-State from violating a city ordinance requiring that all solid waste be taken to a location designated by the City, and provides for a civil penalty and damages in an amount to be established at a later hearing. Tri-State contends that the City has misconstrued the term "solid waste" in the ordinance and that the ordinance does not comply with state enabling legislation. It further asserts that the City's interpretation of the ordinance results in a violation of the commerce clause of the federal constitution as well as federal anti-trust laws, and effects a taking of Tri-State's property. Tri-State also contends that the

ordinance as applied is an improper exercise of police power in violation of the constitutional due process and equal protection clauses. Although we are unpersuaded by most of Tri-State's contentions, we conclude that the court erroneously entered a summary judgment on the alleged violation of the commerce clause. Accordingly, we vacate the judgment and remand for further proceedings.

In 1986, the City entered into an agreement with MMWAC,[1] by which the City was obligated to send all solid waste generated in the municipality to MMWAC once MMWAC commenced operations. The agreement further required the City to adopt a flow control ordinance designating MMWAC as the disposal site for all solid waste generated in the municipality and provided that the City would not "repeal or amend such ordinance without the prior written consent of MMWAC." Under the agreement, which is to remain in effect for twenty-

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[1] MMWAC is a nonprofit corporation created by interlocal agreement. Twelve municipalities comprise its membership. MMWAC's statement of purpose declares that the corporation's purpose

> shall be to own, lease and operate a regional solid waste management program for the mutual environmental and civic benefit of its participating municipalities, and to exercise public powers and functions delegated by said participating municipalities. . . .

MMWAC undertook to build a waste-to-energy facility in Auburn which became operational sometime during the course of these proceedings. Prior to its operation, MMWAC disposed of waste through a transfer station and agreement with Waste Management, Inc. to take the trash to its Rochester, New Hampshire dump.

four years, the City is liable in damages for waste that is not delivered to the site.[2] The agreement further provides that neither party may terminate it for any reason whatsoever. The City thereafter adopted a flow control ordinance prohibiting the disposal of any solid waste at any location other than MMWAC.

Tri-State is a trash hauling corporation with a number of commercial accounts in Auburn. The president and principal shareholder is Guy Hart. Hart also owns and operates a recycling plant in West Paris (Recyclables Unlimited, Inc.). Hart estimates that his company picks up 3000 tons of material per year in Auburn and transports it to West Paris.[3] There the material is commingled with waste from other communities, and all of it is sorted for the purpose of separating recyclable materials that are ultimately sold.[4] The residual waste is generally transported to Maine Energy Recovery Company in Biddeford because its tipping fees are substantially lower ($35/ton as opposed to $75/ton at MMWAC), and because MMWAC will not accept refuse that has been commingled with refuse from nonmember communities.

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[2] The damages are set at 125% of the tipping fee per ton of waste. A tipping fee is the amount required to be paid to MMWAC for its handling of waste received at the site.

[3] One-third of Tri-State's revenue is derived from its Auburn accounts, and approximately one-half of the material collected by Tri-State in Auburn is recyclable material.

[4] *See infra* Part IV, dealing with Tri-State's contentions that the ordinance violates the commerce clause of the United States Constitution.

The City field a land use citation and complaint against Tri-State in the District Court (Lewiston). After the case was removed to the Superior Court pursuant to M.R. Civ. P. 76C,[5] the City filed an amended complaint seeking injunctive relief, a $100 per day penalty for violation of the ordinance, and indemnification of the City for its liability to MMWAC. Tri-State's answer raised a number of affirmative defenses, including all of those that are at issue in this appeal.

In granting the city's and MMWAC's motion for a summary judgment, the court concluded that Auburn had enacted a valid ordinance pursuant to a specific grant of authority from the legislature. It found the ordinance's definition of solid waste to be clear and unambiguous and agreed with the City's interpretation that a business that has placed material in a trash container and pays for it to be hauled away has discarded it. The consequence of this conclusion is that all of the material Tri-State picks up in Auburn is solid waste that must be taken to MMWAC and not to the West Paris recycling facility. The court enjoined Tri-State from taking the material to any location other than MMWAC. It also ordered a further hearing on damages and a civil penalty. The court granted a stay of the injunction pending Tri-State's appeal.

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[5] In the Superior Court, MMWAC was granted leave to intervene as a plaintiff.

I.

The City's ordinance prohibits "the Disposal of any Solid Waste generated within the Municipality by any person or any place other than at [MMWAC]." City of Auburn, Solid Waste Flow Control Ordinance § 2.1. At the center of the present dispute is the construction of the term "solid waste," defined by the ordinance as:

> *useless, unwanted or discarded* solid material with insufficient liquid content to be free flowing, including by way of example, and not by limitation, rubbish, garbage, commercial and industrial waste, scrap materials, junk, refuse, demolition and construction debris and landscape refuse, but shall not include sludge from air or water pollution control facilities, septage tank sludge or agricultural or Unacceptable Waste.

Section 1.3.9 (emphasis added). Tri-State contends that material it collects from its commercial customers in Auburn is not useless, unwanted or discarded, and therefore is not solid waste, until Tri-State has separated recyclable items at its West Paris facility. To decide otherwise, according to Tri-State, is to grant the City and MMWAC a recycling monopoly. The city maintains, and the Superior Court determined, that once a business has placed material in a dumpster and has hired someone to remove that material, it is useless, unwanted or discarded, and thus has become solid waste subject to the ordinance. We agree with the Superior Court's construction of the ordinance.

Although the ordinance does not expressly state who makes the determination that solid material is "useless,

unwanted or discarded," the only reasonable inference is that it is the *generator* of the material, i.e., the person or business that no longer wants or has any use for the material. Therefore, in deciding whether material constitutes solid waste that must be transported to MMWAC, the inquiry is whether the business entity, and not Tri-State, has any further use or plans for the solid material. When, as here, a company places material in a dumpster and hires someone to take it away, that action indicates the company has no further use for the material, and it becomes solid waste subject to the provisions of the ordinance.[6]

II.

Tri-State next contends that the City's flow control ordinance is invalid because it does not comply with state enabling legislation. It argues that the ordinance fails to recognize that the legislature has given a higher priority

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[6] This interpretation of the ordinance does not necessarily lead, however, to the conclusion, commerce clause problems aside, *see infra* Part IV, that the City and MMWAC have complete control over all recycling in Auburn. Under the ordinance, *before* material becomes solid waste, the *generator* must decide it has no further use or plans for that material. When the generator decides to sell or donate one or more of its by-products to a recycler or some other organization, the solid material may not be "useless, unwanted or discarded" and therefore may not be subject to the flow control ordinance. There is nothing in the record before us, however, indicating that any Auburn business made a conscious decision to hire Tri-State because of Tri-State's recycling efforts; nor is it clear from the record that Tri-State's business customers have been charged lower fees because some of the solid material is recycled.

to recycling than to incineration. We are unpersuaded by this argument.

The legislature has declared it is the policy of this state "to establish a coordinated statewide waste reduction, recycling and management program." 38 M.R.S.A. § 1302 (Supp. 1992). To that end, the legislature first enacted a number of statutes relating to the management and disposal of solid waste, *see* 38 M.R.S.A. § 1301-1310-X (1989 & Supp. 1992), and later added laws establishing recycling goals and programs. *See* 38 M.R.S.A. §§ 2131-2141 (Supp. 1992). The City's authority to participate in MMWAC and to enact a flow control ordinance specifically derives from 38 M.R.S.A. § 1304-B, which allows a municipality, through an interlocal agreement, to participate in the ownership or operation of a waste facility and expressly authorizes a municipality to enact an ordinance requiring delivery of solid waste to a designated facility. After enacting section 1304-B, and after the City entered into its agreement with MMWAC and passed its flow control ordinance, the legislature established a goal, effective January 1, 1994, of recycling fifty percent of the municipal solid waste generated each year (38 M.R.S.A. § 2132) and made reduction of waste and recycling higher priorities than waste processing at trash-to-energy plants such as that operated by MMWAC. *See* 38 M.R.S.A. § 1302.

Contrary to Tri-State's contention, even though the legislature made section 1304-B "subject to the provisions of chapter 24" (the chapter on recycling) and the City now seeks to prevent Tri-State from transporting solid material to its recycling facility, this does not mean that the City ordinance does not comport with state enabling

legislation. The legislature adopted an integrated approach to waste management that includes both waste disposal and recycling. The ordinance at issue here specifically addresses the waste disposal aspect of managing municipal waste.[7] It was enacted as part of the City's comprehensive plan, evidenced by its participation in MMWAC, to manage and dispose of waste generated within its borders. It does not violate state enabling legislation.

III.

Tri-State also argues that the City and MMWAC have violated federal antitrust laws by conspiring to monopolize waste disposal in violation of section 1 of the Sherman Antitrust Act and by monopolizing waste disposal in violation of section 2 of that same Act.[8] This issue was

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[7] 38 M.R.S.A. § 1304-B(2) allows the *City* to designate certain materials as recyclable and exempt from the ordinance provision that all solid waste must be delivered to MMWAC, but the statute does not give *Tri-State* the authority to divert solid waste from MMWAC for this purpose. A *generator* of solid materials may arrange to recycle certain items and the decision to do so means that the items never become solid waste subject to the City ordinance. But when a generator merely discards recyclables along with other waste, the recyclables then become solid waste. In that circumstance, 38 M.R.S.A. § 1304-B(2) gives the *City*, but not Tri-State, authority to remove recyclables from the waste stream. The authority to remove recyclables allows the City to comply with the state recycling policy without violating its flow control ordinance or its agreement with MMWAC. *See* 38 M.R.S.A. § 1304-B(4-A).

[8] State antitrust statutes are not here implicated because the legislature has provided that waste handling agreements, such

recently addressed and decided adversely to Tri-State by the United States District Court for the District of Maine in a case involving these same parties and similar issues. *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451 (D. Me. 1992), *aff'd in pertinent part*, No. 92-2218 (1st Cir. July 19, 1993). Assuming that collateral estoppel does not apply, *see Brown v. Osler*, No. 6573 (Me. July 9, 1993), we agree with the federal district court that the City and MMWAC are entitled to state action immunity with respect to the collection and disposal of solid waste.[9] *Id.* at 455-58. In reaching this conclusion, the federal court determined that MMWAC was not a private actor but has "many of the attributes of a municipality." *Id.* at 458. A municipality enjoys state action immunity when it has been given authority from the state to restrict competition in furtherance of implementing a particular state policy.[10] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111

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as the one entered into by the City and MMWAC, are not contracts in restraint of trade. 38 M.R.S.A. § 1304-B(6).

[9] Although the federal district court also discussed the monopolization of recycling, *see Tri-State Rubbish, Inc. v. Waste Management, Inc.* 803 F. Supp. 451, 456 (D. Me. 1992), we are not here presented with, and do not decide, the question whether the City and MMWAC are entitled to state action immunity should they attempt to monopolize recycling activities within the City. In this case, there is no allegation that generators of solid materials have been told they may recycle material only if they turn those materials over to the City and MMWAC. Here the only issue is whether Tri-State, a trash hauler, may divert recyclables from the City's waste stream.

[10] The authority may be express or it may be a "foreseeable result" of what the state has authorized a municipality to do. *City of Columbia v. Omni Outdoor Advertising Inc.*, 111 S.Ct. 1344, 1350 (1991.).

S.Ct. 1344, 1350 (1991); *see also Fisichelli v. City Known as Town of Methuen*, 956 F.2d 12 (1st Cir. 1992) (applying criteria set forth in *City of Columbia*). In this case, the City's flow control ordinance was enacted pursuant to the state policy on waste management that specifically includes authority to adopt this type of ordinance. *See* 38 M.R.S.A. §§ 1302, 1304-B. Accordingly, the City and MMWAC are shielded from the federal antitrust laws by state action immunity.

IV.

Finally, Tri-State argues that the City ordinance violates several provisions of the United States Constitution, including the commerce clause, the takings clause, the due process clause, and the equal protection clause.[11]

Tri-State's assertion that the ordinance violates the fifth amendment's prohibition against the taking of private property for a public purpose without just compensation is without merit. Although the Supreme Court of the United States has not recently addressed this issue, the court early this century upheld a city ordinance establishing a monopoly on trash collection. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905). The Court said that the monopoly effected no taking "simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes." *Id.* at 323. Accordingly, Tri-

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[11] U.S. Const. art. 1. § 8. cl. 3 (commerce clause): amend, V (takings clause); amend. XIV (due process and equal protection clauses).

State's allegation that the ordinance's requirement that all solid waste, including recyclables, be transported to MMWAC effects a taking of its property must fail. *See also Hybud Equip. Corp. v. City of Akron, Ohio*, 654 F.2d 1187, 1192-94 (6th Cir. 1981), *vacated on other grounds* 455 U.S. 931 (1982) (applying *California Reduction Co.* in a situation similar to that presented by this case).

Tri-State's assertions of a due process violation and an equal protection violation are similarly without merit. The ordinance satisfies the three criteria that due process requires.[12] *Tisei v. Town of Ogunquit*, 491 A.2d 564, 569 (Me. 1985); *see also Peters v. Saft*, 597 A.2d 50, 53 (Me. 1991). Nor do the facts support an allegation of selective prosecution in violation of the equal protection clause, because Tri-State has made no showing of a discriminatory or purposeful intent. *Aucella v. Town of Winslow*, 583 A.2d 215, 216 (Me. 1990).

The challenge to the ordinance based on the commerce clause presents a more difficult question, however. Tri-State contends that the ordinance's requirement that all solid waste, including recyclable materials, be taken to

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[12] In *Tisei v. Town of Ogunquit*, 491 A.2d 564 (Me. 1985), we explained the criteria used to determine if a municipal ordinance satisfies due process:

> "1. The *object* of the exercise must be to provide for the public welfare.
> 2. The legislative *means* employed must be appropriate to the achievement of the ends sought.
> 3. The *manner of exercising* the power must not be unduly arbitrary or capricious."

Id. at 569 (quoting *State v. Rush*, 324 A.2d 748, 753 (Me. 1974) (emphasis in original).

MMWAC impermissibly burdens interstate commerce, because the ordinance prevents Tri-State from sorting recyclables at its West Paris facility and then selling those recycled materials in interstate markets.[13] We agree with Tri-State that the court erred in entering a summary judgment on this contention because there are genuine issues of material fact that remain to be addressed.[14]

The United States Supreme court has made clear that a state or one of its subdivisions may not curtail the movement of articles of commerce either into or out of the state in order to advance its own economic interests. *Fort Gratiot Landfill v. Michigan Dept. of Natural Resources,* 112 S. Ct. 2019, 2023 (1992). Solid waste is an article of commerce. *Id.* Likewise, recyclable materials are or may be part of the stream of commerce. A statute or ordinance

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[13] The record does not indicate that Tri-State seeks to place residual trash in the interstate market. Accordingly, we do not decide whether the requirement that *all* trash be taken to MMWAC violates the commerce clause. *See, e.g., Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Auth.,* 814 F. Supp. 1566 (M.D. Ala. 1993). We are here concerned only with the recycled materials that Tri-State wants to remove from the trash and place in interstate commerce.

[14] The City and MMWAC contend that Tri-State failed to raise the commerce clause issue in the Superior Court and therefore did not preserve it for appellate review. Tri-State's answer to the City's complaint included the commerce clause as an affirmative defense. In addition, after the hearing on the City's and MMWAC's motion for a summary judgment but prior to the court's decision on the motion, Tri-State filed an application for further hearing, specifically mentioning the commerce clause and citing a United State [sic] Supreme Court case decided subsequent to the hearing. The court denied Tri-State's request. The commerce clause issue has been adequately preserved.

that discriminates against interstate commerce is unconstitutional unless the discrimination is justified by factors unrelated to economic protectionism and there are no reasonable alternatives available.[15] *Id.* at 2023-34; *Maine v. Taylor*, 477 U.S. 131, 151 (1986). On the other hand, a statute will receive less strict scrutiny if it regulates even-handedly to further a legitimate local interest and its effects on interstate commerce are only incidental. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Then, the statute will be upheld unless the burden on commerce clearly exceeds the local benefits.[16] *Id. Fort Gratiot* teaches that because a statute purports to regulate only intrastate commerce and does not specifically mention or differentiate the articles of interstate commerce, does not mean the statute is not discriminatory.[17] 112 S. Ct. at 2024-26. Moreover, the volume of commerce affected is not relevant to

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[15] Discriminatory statutes have also withstood commerce clause scrutiny when it is determined that the state is a market participant, rather than a market regulator. *See, e.g., White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 214-15 (1983). When the market-participant doctrine applies, the state may impose burdens only on the particular market in which it is a participant but may not impose conditions that have regulatory effects on other markets. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

[16] The Supreme Court has acknowledged that there is no bright line separating the cases receiving strict scrutiny from those in which the scrutiny is less strict. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

[17] The statute struck down in *Fort Gratiot Landfill v. Michigan Dept. of Natural Resources* read, in relevant part:

> A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is

determining whether there is discrimination. Rather, the volume of commerce affected measures only the extent of the discrimination. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992).

The ordinance in this case discriminates against interstate commerce because it requires businesses such as Tri-State to take recyclable materials to MMWAC and prohibits trash haulers from marketing the recyclables in interstate commerce. Because the ordinance is discriminatory, the burden shifts to the City and MMWAC to show valid reasons for the ordinance other than economic protectionism and to demonstrate the unavailability of reasonable alternatives. *Hunt v. Washington State Apple Advertising Comm'n.* 432 U.S. 333, 353 (1977) (burden to show discrimination rests on party challenging statute,

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explicitly authorized in the approved county solid waste management plan.

112 S. Ct. 2019, 2022 (1992). In *Fort Gratiot* the Court also discussed a city ordinance it had previously struck down as discriminating against interstate commerce. That ordinance made it unlawful to sell pasteurized milk in a particular city unless the milk had been processed at a plant located within five miles of the city. *Id.* at 2025 (citing *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)). The Court explained that the fact that the ordinance discriminated against in-state processors as well as out-of-state processors "did not mitigate its burden on the interstate commerce." *Id.; see also Waste Sys. Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386-87 (8th Cir. 1993) (holding that ordinance requiring all municipal solid waste generated within county to be delivered to a particular facility discriminated against interstate commerce); *Waste Recycling, Inc. v. Southeast Alabama Waste Disposal Auth.*, 814 F. Supp. 1566, 1580 (M.D. Ala. 1993) (holding that three municipal flow control ordinances similar to the one here at issue discriminated against interstate commerce).

but once discrimination demonstrated, burden shifts to state to justify regulation and to show unavailability of reasonable alternatives). Accordingly, the matter must be remanded to the Superior Court to provide the City and MMWAC an opportunity to introduce facts justifying the ordinance's provisions discriminating against interstate commerce as to recyclable materials, and demonstrating the unavailability of reasonable alternatives.[18] Because the facts of this case require us to address only the removal of recyclables from the solid waste stream, leaving intact the requirement that nonrecyclable waste must be delivered to MMWAC, on remand, Tri-State must demonstrate that it has the capacity to separate the recyclables and deliver the remaining waste to MMWAC.[19]

Other contentions raised by Tri-State are without merit and require no discussion.

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[18] MMWAC argues that the ordinance is necessary because the city needs to monitor the percentage of solid waste being recycled in order to meet the state's recycling goals. It is far from clear, however, that there are no other ways to monitor the quantity of materials being recycled, such as requiring licensed trash haulers to report to the City the amount of recyclable material they have collected.

[19] Because this appeal followed the entry of a summary judgment, the factual record relating to the commerce clause is not fully developed. On remand, Tri-State should also demonstrate more specifically the interstate recycling markets affected.

The entry is:

Judgment vacated. Remanded to the Superior Court for Further Proceedings consistent with the opinion herein.

All Concurring.

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NOTICE: Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Maine 04112, of any typographical or other formal errors in this opinion.

APPENDIX D

38 Me. Rev. Stat. Ann. § 1304-B.
Delivery of solid wastes to specific waste facilities

1. Findings and purpose. The Legislature makes the following findings of fact. The State requires each municipality to provide for the disposal facility of domestic and commercial solid waste generated within the municipality. Solid waste contains valuable recoverable resources, including energy. Many municipalities have found that energy recovery reduces the cost of solid waste disposal. Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. Because of the complicated technology, most energy recovery facilities have high capital costs and long payback periods. In order to remain cost effect throughout their lives, these energy recovery facilities require a guaranteed, steady supply of waste. Consequently, municipalities utilizing energy recovery facilities are usually required to enter long-term agreements to provide the facilities with specific amounts of waste. In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid waste generated within their borders.

The purpose of this section is to promote the recovery of resources from solid waste by creating one of the conditions which make energy recovery economically feasible,

assuring municipalities the authority to guarantee a steady supply of solid waste to specific waste facilities.

2. **Flow control.** Municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes;

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility; and

C. Designating certain materials as recyclable and exempt from the provisions of paragraph B.

3. **Ordinances.** This chapter shall not be construed as limiting the authority of any municipality to enact ordinances for the regulation of solid waste or septage disposal, provided that these ordinances are not less stringent than or inconsistent with section 1310-U or other provisions of this chapter or the rules adopted under this chapter.

4. **Contracts.** In order to encourage and facilitate the financing and development of solid waste facilities, including, but not limited to, facilities for resource recovery, municipalities shall have the following powers, notwithstanding any law, charter, ordinance provision or limitation to the contrary:

A. To contract with a corporation described in subsection 5 or a refuse disposal district organized under chapter 17[1] or any person, including, but not limited to, the owner or operator of any waste facility, for the collection, transportation, storage, processing, salvaging or disposal of waste. Any such contract may be for such term of years and may contain such other provisions as the municipality may approve. Any such contract may provide that, in consideration for the obligation of the facility owner or operator to handle all or any portion of the solid waste generated in the municipality, the municipality shall pay to the facility owner or operator such fees, assessments and other payments as shall be established in accordance with the contract.

B. Without limiting the generality of the powers conferred in paragraph A, to agree in such a contract to pay fees, assessments or other payments in such amounts as may be reasonably necessary to pay:

(1) Costs associated with financing, developing, constructing, repairing, maintaining and operating all or any one or more of the waste facilities owned or operated by the facility owner or operator, including, but not limited to, the payment of debt service and the maintenance of reasonable reserves or sinking funds in connection with the financing or operation of any such waste facilities;

(2) Any other costs incurred by the facility owner or operator in connection with the handling of solid waste, whether performed

at any waste facility referred to in subparagraph (1) or at another such facility differently owned and operated; and

(3) Any deficiencies arising by virtue of the failure of any other municipality so agreeing to meet its obligations to pay the costs set forth in subparagraphs (1) and (2) in accordance with any similar agreement with the same facility owner; and

C. To pledge the full faith and credit of the municipality for the payment of fees, assessments and other payments, as provided in paragraphs A and B, and to levy upon and raise from taxable estates within the municipality by general taxes the amounts required to pay these fees, assessments and payments or to raise those amounts by means of any fee, user charge or other cost-sharing or assessment mechanism duly adopted and authorized by the municipality or to borrow those amounts by issuance of general obligation bonds or notes.

Any contract complying with the requirements of this subsection and subsection 6 shall be a properly authorized, legal, valid, binding and enforceable obligation of the municipality, regardless of whether the agreement was authorized, executed or delivered prior to or after the effective date of this subsection.

4-A. Contract limitations. Any contract, including any contract in existence on the effective date of this subsection, for the provision of waste disposal, transportation or handling services to municipalities is subject to the following limitations.

A. No contract for waste disposal, transportation or handling services may prevent a municipality from recycling any portion of its solid waste, provided that any minimum BTU content level and minimum tonnage level required by that contract is maintained by the municipality.

B. No contract for waste disposal, transportation or handling services may prevent a municipality from meeting its obligations to supply a minimum BTU content level and minimum tonnage level required by that contract using solid waste generated outside its borders, provided that:

(1) The municipality is or will be unable, as the direct result of recycling or source reduction efforts, to meet the obligations using solid waste generated within its jurisdiction; and

(2) The municipality is liable for any damages caused by any solid waste it relies upon to satisfy the provisions of its contract.

C. For those waste disposal, transportation or handling services contracts which do not principally rely upon requiring minimum BTU content level or minimum tonnage level to secure solid waste for the waste disposal facility, but which instead rely upon a requirement that the municipality provide all or most of its solid waste to the waste disposal facility, no such contract may prohibit a municipality during the term of the contract from recycling those materials which the municipality determines to be recyclable.

5. Public waste disposal corporations. Notwithstanding any law, charter, ordinance provision or limitation to the contrary, pursuant to any interlocal agreement entered into in accordance with Title 30-A, chapter 115,[2] any 2 or more municipalities may organize or cause to be organized or may participate in one or more corporations organized as nonprofit corporations under Title 13, chapter 81,[3] or Title 13-B for the purpose, among other permissible purposes, of owning or operating any one or more waste facilities described in subsection 4, paragraph A, and a subscribing municipality may agree in any such interlocal agreement to pay fees, assessments or other payments as described in subsection 4, paragraph B, for such term of years and on such other terms as the interlocal agreement may provide and may pledge the full faith and credit of the municipality to the same extent provided in subsection 4, paragraph C. The applicable interlocal agreement or the articles of incorporation or bylaws of the corporation shall provide that:

A. The corporation shall be organized and continuously thereafter operated as a nonprofit corporation, no part of the net earnings of which may inure to the benefit of any member, director, officer or other private person;

B. The directors of the corporation shall be elected by the municipal officers of the municipalities participating in the corporation; and

C. Upon dissolution or liquidation of the corporation, title to all of its property shall vest in one or more of the municipalities participating in the corporation.

Any interlocal agreement complying with the requirements of this subsection and subsection 6 shall be a properly authorized, legal, valid, binding and enforceable obligation of the municipality, regardless of whether the agreement was authorized, executed or delivered prior to or after the effective date of this subsection. Any corporation organized in a manner which satisfies the requirements set forth in this subsection and subsection 6, whether organized prior to or after the effective date of this subsection, shall be deemed for all purposes as organized pursuant to this subsection. If so provided in the applicable interlocal agreement, any such corporation shall have the power, in addition to any other powers which may be delegated under Title 30-A, chapter 115, to issue, on behalf of one or more of the municipalities participating in the corporation, in order to finance the facilities, revenue obligation securities issued in accordance with Title 10, chapter 110, subchapter IV,[4] and any other bonds, notes or debt obligations which municipalities are authorized to issue by applicable law. For these purposes, the term "municipal officers" as used in Title 10, chapter 110, subchapter IV, means the board of directors of any corporation described in this subsection. Title 10, section 1064, subsection 6, shall not be construed to prohibit the assignment or pledge as collateral security of any contract of a municipality authorized by this section or of any or all of the payments under this section, regardless of whether the provisions of subsection 4, paragraph C, are applicable to the contract or payments.

6. Relationship to other laws. The obligation of a municipality to pay any fees, assessments or other payments in accordance with any agreement entered into

pursuant to subsection 4 or any interlocal agreement referred to in subsection 5 shall not constitute a "debt" or "indebtedness" of the municipality within the meaning of any statutory, charter or ordinance provision limiting the incurrence or the amount of municipal indebtedness nor shall the authorization or incurrence of the obligation or any municipal action to raise funds to meet the obligation by any means set forth in subsection 4, paragraph C, require or be subject to any voter referendum or approval under any law or any charter or ordinance provision.

A. A municipality may agree to make payments in accordance with subsection 4, paragraph B, or in accordance with the provisions of any interlocal agreement referred to in subsection 5 with regard to all or any portion of debt incurred or to be incurred for the financing of one or more waste facilities, provided that no such payments shall be made with respect to debt or any portion of debt which, when incurred, would cause the total principal balance of all then outstanding debt or portions of debt to which the payments apply to exceed:

(1) Three percent of the last full state valuation of the municipality; minus

(2) The municipality's then obtaining allocable share of any debt or portions of debt described in paragraph B with regard to which it is obliged to make payments.

B. Notwithstanding paragraph A, 2 or more municipalities may agree to make payments in accordance with subsection 4, paragraph B, or in accordance with any interlocal agreement referred to in subsection 5 with regard to all or any portion of debt incurred or to be incurred

for the financing of one or more waste facilities, provided that no such payments may be made with respect to debt or any portions of debts which, when incurred, would cause the total principal balance of all then outstanding debt or portions of debt to which the payments apply to exceed:

(1) Three percent of the sum of the last full state valuation of all municipalities so agreeing; minus

(2) Any amounts of debt or portions of debt described in paragraph A in connection with which any such municipality is obliged to make payments.

The limitations set forth in paragraphs A and B shall only apply to agreements by which a municipality or group of municipalities have agreed to make payments directly based, among other things, on a facility owner's costs of debt service and other costs of financing and shall not be construed to apply to contract payments calculated on any other basis, even if the facility owner uses the payments to meet its debt service obligations.

The obligation of the municipality to pay fees, assessments and other payments in accordance with subsection 4 or any interlocal agreement referred to in subsection 5 shall be binding upon and enforceable against the municipality without regard to whether all or any one or more of the waste facilities referred to in subsection 4, paragraph B, subparagraph (1), becomes operational or was or will be in operation during the period for which the fees, assessments or other payments are so charged.

No contract entered into in accordance with subsection 4 nor any ordinance adopted under the authority of subsection 2 may be deemed a contract in restraint of trade or otherwise unlawful under Title 10, chapter 201.[5]

Notwithstanding any law, charter or ordinance provisions to the contrary, the powers conferred upon a municipality pursuant to subsections 4 and 5 and this subsection may be exercised by the municipal officers as defined in Title 30-A, section 2001, including the assessors of a plantation, only when authorized, in the case of a municipality with a city or town council, by action of the council and, in the case of a municipality without such a council, by action of the town meeting. This paragraph shall apply whether or not the action of the city council, town council or town meeting was taken before or after March 21, 1986.

Nothing in this section may be construed to be a limitation on the Home Rule powers granted to municipalities under Title 30-A, section 3001, or on the ability of communities to jointly exercise their powers as is recognized in Title 30-A, section 2201. This section provides an additional and alternative method for carrying out this subchapter.

1983, c. 380, § 1; 1983, c. 726, § 1; 1983, c. 743, § 16; 1985, c. 337, §§ 3, 4, eff. June 13, 1985; 1985, c. 506, § B, 38, eff. July 2, 1984; 1985, c. 593, §§ 8 to 10, eff. March 21, 1986; 1987, c. 517, §§ 14 to 17, eff. June 29, 1987; 1987, c. 737, §§ C, 95, 96.

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[1] Section 1701 et seq. of this title.

[2] Section 2201 et seq. of title 30-A.

[3] Section 901 et seq. of title 13.

[4] Section 1061 et seq. of title 10.

[5] Section 1101 et seq. of title 10.

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38 Me. Rev. Stat. Ann. § 1304-B (Supp.).
Delivery of solid wastes to specific waste facilities

1. Findings and purpose. The Legislature makes the following findings of fact. Subject to the provisions of chapter 24[1], the State requires each municipality to provide for disposal services for domestic and commercial solid waste generated within the municipality. Solid waste contains valuable recoverable resources, including energy. Many municipalities have found that energy recovery reduces the cost of solid waste disposal. Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. Because of the complicated technology, most energy facilities have high capital costs and long payback periods. In order to remain cost effective throughout their lives, these energy recovery facilities require a guaranteed, steady supply of waste. Consequently, municipalities utilizing energy recovery facilities are usually required to enter long-term agreements to provide the facilities with specific amounts of waste. In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the

economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid waste generated within their borders.

The purpose of this section is to promote the recovery of resources from solid waste by creating one of the conditions which make energy recovery economically feasible, assuring municipalities the authority to guarantee a steady supply of solid waste to specific waste facilities.

2. Flow control. Subject to the provisions of chapter 24[1], municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes;

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility;

C. Designating certain materials as recyclable and exempt from the provisions of paragraph B; and

D. Designating yard wastes as compost material and requiring delivery of these wastes to a designated composting facility.

3. Repealed. Laws 1989, c. 585, § 14.

[See main volume for 4]

4-A. Contract limitations. Any contract, including any contract in existence on the effective date of this subsection, for the provision of waste disposal, transportation or handling services to municipalities is subject to the following limitations.

A. No contract for waste disposal, transportation or handling services may prevent a municipality from recycling any portion of its solid waste, provided that any minimum BTU content level and minimum tonnage level required by that contract is maintained by the municipality.

B. No contract for waste disposal, transportation or handling services may prevent a municipality from meeting its obligations to supply a minimum BTU content level and minimum tonnage level required by that contract using solid waste generated outside its borders, provided that:

(1) The municipality is or will be unable, as the direct result of recycling or source reduction efforts, to meet the obligations using solid waste generated within its jurisdiction; and

(2) The municipality is liable for any damages caused by any solid waste it relies upon to satisfy the provisions of its contract.

C. For those waste disposal, transportation or handling services contracts which do not principally rely upon requiring minimum BTU content level or minimum tonnage level to secure solid waste for the waste disposal facility, but which

instead rely upon a requirement that the municipality provide all or most of its solid waste to the waste disposal facility, no such contract may prohibit a municipality during the term of the contract from recycling those materials which the municipality determines to be recyclable.

D. A municipality which anticipates that it will be unable to meet its contract obligation to supply a minimum BTU content level or minimum tonnage due to waste reduction or recycling programs and is unable to reach an agreement with the incinerator for the anticipated reduction may request the agency to intercede. The agency shall assist the incinerator in soliciting solid waste to mitigate any anticipated shortfall in minimum BTU content level or minimum tonnage. If no agreement on mitigation of an anticipated shortfall is reached, the terms of the original contract shall prevail, except as otherwise provided in this chapter.

5. Public waste disposal corporations. Notwithstanding any law, charter, ordinance provision or limitation to the contrary, pursuant to any interlocal agreement entered into in accordance with Title 30-A, chapter 115,[2] any 2 or more municipalities may organize or cause to be organized or may participate in one or more corporations organized as nonprofit corporations under Title 13, chapter 81,[3] or Title 13-B for the purpose, among other permissible purposes, of owning or operating any one or more waste facilities described in subsection 4, paragraph A, and a subscribing municipality may agree in any such interlocal agreement to pay fees, assessments or other payments as described in subsection 4, paragraph B, for

such term of years and on such other terms as the interlocal agreement may provide and may pledge the full faith and credit of the municipality to the same extent provided in subsection 4, paragraph C. The applicable interlocal agreement or the articles of incorporation or bylaws of the corporation must provide that:

> **A.** The corporation shall be organized and continuously thereafter operated as a nonprofit corporation, no part of the net earnings of which may inure to the benefit of any member, director, officer or other private person;
>
> **B.** The directors of the corporation shall be elected by the municipal officers of the municipalities participating in the corporation; and
>
> **C.** Upon dissolution or liquidation of the corporation, title to all of its property shall vest in one or more of the municipalities participating in the corporation.

Any interlocal agreement complying with the requirements of this subsection and subsection 6 must be a properly authorized, legal, valid, binding and enforceable obligation of the municipality, regardless of whether the agreement was authorized, executed or delivered prior to or after the effective date of this subsection. Any corporation organized in a manner that satisfies the requirements set forth in this subsection and subsection 6, whether organized prior to or after the effective date of this subsection, shall be deemed for all purposes as organized pursuant to this subsection. If so provided in the applicable interlocal agreement, any such corporation shall have the power, in addition to any other powers that may be delegated under Title 30-A, chapter 115, to issue, on

behalf of one or more of the municipalities participating in the corporation, in order to finance the facilities, revenue obligation securities issued in accordance with Title 10, chapter 110, subchapter IV,[4] and any other bonds, notes or debt obligations which municipalities are authorized to issue by applicable law. For these purposes, the term "municipal officers" as used in Title 10, chapter 110, subchapter IV, means the board of directors of any corporation described in this subsection. Title 10, section 1064, subsection 6, may not be construed to prohibit the assignment or pledge as collateral security of any contract of a municipality authorized by this section or of any or all of the payments under this section, regardless of whether the provisions of subsection 4, paragraph C, are applicable to the contract or payments. The provisions of Title 10, sections 1063 and 1064, subsection 1, paragraph A and paragraph C, subparagraph (4) do not apply to revenue obligation securities issued by any public waste disposal corporation described in this subsection.

[See main volume for 6]

7. **Subjugation.** Notwithstanding any provision of this section to the contrary, the exercise of any power or authority granted under this section is subject to the provisions of chapter 24.[1]

1989, c. 585, §§ E, 12 to 16; 1989, c. 869, § C-10; 1991, c. 72, §§ 4 to 6, eff. May 6, 1991.

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[1] Section 2101 et seq. of this title

[2] Section 2201 et seq. of title 30-A.

[3] Section 901 et seq. of title 13.

[4] Section 1061 et seq. of title 10.

APPENDIX E

SOLID WASTE FLOW CONTROL

This Ordinance Relates to the Disposal of Solid Waste: Prescribing Rules and Regulations therefore; and Providing Penalties for Violation hereof.

The City of Auburn is hereinafter referred to as the "Municipality".

ARTICLE I

Section 1.1 Short Title

This Ordinance shall be known as and may be cited as the "Ordinance Relating to the Disposal of Solid Waste Prescribing Rules and Regulations Therefor: Providing Penalties for Violation Thereof" and shall be referred to herein as the "Ordinance."

Section 1.2 Purpose

The purpose of the Ordinance is to protect the health, safety and general well-being of the citizens of the Municipality; enhance and maintain the quality of the environment, conserve natural resources and prevent water and air pollution by providing a comprehensive rational and effective means of regulating the disposal of solid waste in the municipality in accordance with the provisions of Title 30 M.R.S.A. ss1304-B ss1305 as amended.

Section 1.3 Definitions

For the purposes of the Ordinance, the following definitions shall be observed in the construction of this Ordinance.

Section 1.3.2.

"Ashes" shall mean that residue from the burning of wood, coal, coke or other combustible material.

Section 1.3.3.

"Board" shall mean the Town Council, City Council or Board of Selectmen, whichever is applicable.

Section 1.3.4.

"Dispose" shall mean to discharge, dispose, deposit, dump or place any Solid Waste.

Section 1.3.5.

"Disposal" shall mean the discharge, disposal, deposit, dumping or placing of any solid waste.

Section 1.3.6.

"Hazardous Waste" shall mean a waste substance or material in any physical state, designated as Hazardous Waste by the terms of a certain Waste Handling Agreement, dated as of July 1, 1986, between the Municipality and Mid Maine Waste Action Corporation (hereinafter the "Waste Handling Agreement").

Section 1.3.7.
"Infectious Waste" shall include those wastes so defined by the Solid Waste Management Regulations promulgated by the Department of Environmental Protection pursuant to Title 38 M.R.S.A. ss1304.

Section 1.3.8.
"Resource Recovery" shall mean the recovery of energy and materials or substances that still have useful physical or chemical properties after serving a specific purpose and can be reused or recycled for the same or other purposes.

Section 1.3.9.
"Solid Waste" shall mean useless, unwanted or discarded solid material with insufficient liquid content to be free flowing, including by way of example, and not by limitation, rubbish, garbage, commercial and industrial waste, scrap materials, junk, refuse, demolition and construction debris and landscape refuse, but shall not include sludge from air or water pollution control facilities, septage tank sludge or agricultural or Unacceptable Waste.

Section 1.3.10.
"Solid Waste Disposal Facility" or "Disposal Facility" shall mean any land or structure or combination of land area and structures, including dumps, landfills and transfer stations used for storing, transferring, collecting, separating, processing, recycling, recovering, treating, salvaging, reducing, incinerating or disposing of Solid Wastes.

Section 1.3.11.

"Unacceptable Waste" shall mean that portion of Solid Waste which is not defined as Acceptable Waste by the terms of the Waste Handling Agreement and includes, but is not limited to sewage and its derivatives, construction and demolition debris, special nuclear or by-product materials within the meaning of the Atomic Energy Act of 1954, as amended, and Hazardous Waste.

ARTICLE II MUNICIPAL SOLID WASTE DISPOSAL FACILITY

Section 2.1 Designation

2.1.1. In Accordance with the provisions of Title 30 M.R.S.A. ss1304-B, the Municipality hereby designates the Site, as defined in the Waste Handling Agreement as its public Solid Waste Disposal Facility for the purposes cited in 1.3.10. of this Ordinance or any transfer station or other location approved in writing by MMWAC. Upon the "Commencement of Operations" as defined in the Waste Handling Agreement, the Disposal of any Solid Waste generated within the Municipality by any person or any place other than at this designated Disposal Facility or approved transfer station is prohibited, provided however, the owner of any lot, or any other person with the permission of the lot owner, may Dispose or dump inert substances such as earth, rocks, concrete or similar material for fill purposes only, subject to state and local land use regulations.

ARTICLE III ADMINISTRATION

Section 3.1

Section 3.1.1. The operation of the Disposal Facility shall conform to all pertinent regulations or directives of all local, county, state or federal agencies which may have jurisdiction.

ARTICLE IV RESTRICTIONS AND FEES FOR DISPOSAL

Section 4.1 Restructions

Section 4.1.1. No person, firm or corporation shall permanently dispose of Solid Waste or refuse of any kind upon any land within the corporate limits of the Municipality, unless such land has been designated by the Board as a Solid Waste Disposal Facility.

Section 4.1.2. Certain materials may be excluded by the Board (to the extent permitted under the Waste Handling Agreement) by regulation from the Solid Waste which must be deposited at a Solid Waste Disposal Facility. These excluded materials may include junk automobile bodies and similar bulky waste which may require special processing prior to disposal, tree and tree trunks and limbs, burning materials and materials containing hot or live coals; Hazardous Waste; and other materials which the Municipality deems necessary to exclude. Hazardous Waste shall be handled in accordance with Title 38 M.R.S.A. ss 1317, *et seq.* as amended.

Section 4.1.3. Except for licensed disposal of Hazardous or Infectious Waste, it shall be unlawful for any person, firm, assocation [sic] or corporation to burn or incinerate

any Solid Waste within the Municipality other than trees, tree limbs, leaves and other wood waste except to the extent otherwise permitted under the ordinances and laws of the Municipality.

ARTICLE V RULES AND REGULATIONS

Section 5.1 Authorized Disposal Facility Users

Section 5.1. The availability and use of the Disposal Facility shall be limited to residents of the Municipality, and to those residents of any other municipality which may, be [sic] mutual agreement, be authorized to use the Disposal Facility. The Board may further regulate hualing [sic] of Wolid [sic] Waste by requiring it to be delivered to the municipal transfer station prior to transfer to the Disposal Facility.

5.2 Resource Recovery

5.1.1. [sic] The Municipality may require Solid Waste to be separated into such categories as may be established by any Board regulation and disposed of only in such manner and at such sites and locations as designated.

Section 5.3. Property Rights

Section 5.3.1. Any Solid Waste deposited within the Disposal Facility shall become the property of the Municipality or of MMWAC, pursuant to the terms of the Waste Handling Agreement. No one shall salvage, remove, or carry off any such deposited Solid Waste without prior approval of the Municipality or MMWAC.

ARTICLE VI MISCELLANEOUS

Section 6.1.1. The Board may establish by order a schedule of license fees to be charged to commercial refuse collectors for the use of the Disposal Facility which schedule shall be posted and published. All fees collected shall be for the use of the Municipality. Any license granted hereunder may be revoked upon any violation of this Ordinance.

Section 6.1.2. It shall be the duty of the Board or its designee to enforce the provisions of this Ordinance.

Section 6.1.3. All ordinances or parts of ordinances in conflict with this Ordinance are hereby repealed.

Section 6.1.4. If any section, subsection, sentence of part of the Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance.

Section 6.1.5. Whoever violates any of the provisions of this Ordinance shall be punished by a fine of not more than one hundred ($100.00) dollars the day of violation plus costs which fine shall be recovered on complaint to the use of the Municipality. This provisions shall not preclude the Board from simultaneously seeking appropriate equitable relief.

APPENDIX F

STATE OF MAINE
ANDROSCOGGIN, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-90-561

----------X

CITY OF AUBURN,

Plaintiff,

- and -

MID-MAINE WASTE ACTION CORPORATION,

Plaintiff/Intervenor,

- versus -

TRI-STATE RUBBISH, INC.,

Defendant.

----------X

ANSWER TO AMENDED COMPLAINT OF PLAINTIFF AND PLAINTIFF/INTERVENOR

Now comes the Defendant Tri-State Rubbish, Inc. ('Tri-State"), acting by and through its attorney, Ralph A. Dyer, and answers the Amended Complaint of the Plaintiff City of Auburn ("Auburn") and the Plaintiff/Intervenor Mid-Maine Waste Action Corporation ("MMWAC") as follows:

* * *

16. Tri-State is engaged as a processor and seller of recyclable materials in interstate and foreign commerce. Auburn's Solid Waste Disposal Act is a violation of exclusive jurisdiction of the Federal government to regulate interstate commerce pursuant to the U.S. Constitution, Article 1, Sec. 8.

* * *

APPENDIX G

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6654
Law Docket No. Cum-93-45

TRI-STATE RUBBISH, INC.

v.

TOWN OF GRAY

and

REGIONAL WASTE SYSTEMS, INC.

Argued September 9, 1993
Decided October 15, 1993

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

RUDMAN, J.

Tri-State Rubbish, Inc. ("Tri-State"), and Recyclables Unlimited Services, Inc. ("RUSI"), appeal from the adverse summary judgments entered in the Superior Court (Cumberland County, *Lipez, J.*) on their claims for declaratory judgment and injunctive relief. The trial court rejected contentions by Tri-State and RUSI that the Town of Gray's Solid Waste, Flow Control and Recycling Ordinance violates the Commerce Clause of the U.S. Constitution[1], denies Tri-State and RUSI equal protection of the laws, and violates state and federal antitrust laws.

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

Although the equal protection and antitrust challenges are without merit, genuine issues of material fact remain whether the Ordinance violates the Commerce Clause. We therefore vacate the judgments of the Superior Court.

Effective April 3, 1992, the Town of Gray ("Gray") adopted a Solid Waste, Flow Control and Recycling Ordinance ("Ordinance") which requires that all solid waste generated in the Town of Gray be disposed of at the Portland facility of Regional Waste Systems, Inc. ("RWS"). The avowed purpose of the Ordinance was to regulate solid waste collection and disposal, encourage recycling, and provide property owners with disposal facilities at a reasonable cost. The Ordinance was authorized by state law, 38 M.R.S.A. § 1304-B(2) (1989 & Supp. 1993)[2], and complied with the Waste Handling Agreement between Gray and RWS.

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[2] **Flow Control.** Subject to the provisions of Chapter 24 [MAINE WASTE MANAGEMENT AGENCY 38 M.R.S.A. § 2101 (Supp. 1993)] municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over said waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes;

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility;

C. Designating certain materials as recyclable and exempt from the provisions of paragraph B; and

D. Designating yard wastes as compost material and requiring delivery of these wastes to a designated composting facility.

RWS operates a waste-to-energy plant located in Portland. Twenty-one member municipalities, including Gray, pledged their full faith and credit to repay the bonds that financed construction of the plant should RWS default on its obligation to repay. In an effort to insure that RWS remains financially viable, all member municipalities passed ordinances similar to Gray's, guaranteeing that all "acceptable waste"[3] generated within each municipality would be funneled to RWS for incineration.

Tri-State, a Maine corporation, has engaged in the business of commercial and residential trash collection in the Town of Gray for almost twenty years. In the past, Tri-State has generally disposed of the waste it collects at either the facilities of Maine Energy Resources Corporation ("MERC") in Biddeford, or Mid-Maine Waste Action Corporation ("MMWAC") in Auburn. MERC and MMWAC would incinerate the waste to generate energy, that would then be sold in interstate commerce. RUSI, a Maine corporation, recycles glass, paper, and corrugated board and sells the materials in interstate commerce.

Disposal facilities generally charge a "tipping fee" for accepting waste. The Gray Ordinance, however, allows a private waste generator to deposit its trash at the Gray transfer station without payment of a tipping fee. Commercial waste haulers, on the other hand, must transport their waste to RWS for incineration. If a waste generator segregates its waste into recyclable/non-recyclable components, and then hires a commercial

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[3] According to the Ordinance, acceptable waste includes "[o]rdinary household, municipal, institutional, commercial and industrial solid waste," and excludes hazardous waste.

hauler to remove the waste, the hauler must take the recyclable components to the Gray transfer station and the non-recyclable components to RWS.

Tri-State objects to the Ordinance because of the increased tipping fees that the law imposes on commercial haulers.[4] RUSI objects to the Ordinance because it cuts off the flow of recyclable waste that RUSI processes in its business.

Tri-State and RUSI contend that the Ordinance violates their right to equal protection of the laws, because it discriminates against commercial enterprises. This contention is meritless. *City of Auburn v. Tri-State Rubbish, Inc.*, No. 6625, slip op. at 10 (Me. Aug. 5, 1993). Similarly, Tri-State and RUSI's claim that the arrangement violates antitrust laws is unsupportable. We recently ruled that state action immunity to federal antitrust laws applies to this type of arrangement. *Id.* at 8. *See also Tri-State Rubbish, Inc. v. Waste Management Inc.*, 803 F. Supp. 451 (D. Me. 1992), *aff'd in pertinent part*, No. 92-2218 (1st Cir. July 19, 1993). The flow control ordinance enabling act 38 M.R.S.A. § 1304-B(2), authorizes Gray's arrangement with RWS and therefore precludes any violation of state antitrust laws. *See Beaulieu v. City of Lewiston*, 440 A.2d 334, 345 (Me. 1982) (specific legislation controls general).

The Commerce Clause violation asserted by Tri-State and RUSI, however, presents genuine issues of material

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[4] RWS charged (as of July 1, 1992) forty-three dollars per ton for municipal solid waste and sixty-one dollars per ton for commercial solid waste. The tipping fees at MERC for the same time period ranged from twenty-six to thirty-five dollars per ton.

fact. Although the waste at issue is generated in-state and largely disposed of in-state, it is an object of interstate commerce. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992). The aggregate effect of ordinances similar to Gray's could have a substantial impact on interstate commerce. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981).

In the *City of Auburn* case, the question whether a plaintiff that did not seek to place trash in the interstate market could challenge a similar ordinance on Commerce Clause grounds was not squarely presented. *Id.* at 11 n.13. The present case, however, presents the issue, which we now answer affirmatively. Even if it is true that Tri-State does not engage in interstate commerce itself, it has standing to challenge the Ordinance on Commerce Clause grounds. The Ordinance inflicts an injury in fact on Tri-State, and as a hauler of solid waste, Tri-State falls within the "zone of interests" protected by the Commerce Clause. *Diamond Waste, Inc. v. Monroe County*, 796 F. Supp. 1511, 1516 (M.D. Ga. 1992). *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 761 (S.D. Ind. 1990), *aff'd*, 975 F.2d 1267, 1274-75 (7th Cir. 1992).

The "Dormant Commerce Clause"[5] prohibits states and their political subdivisions from "advanc[ing] their

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[5] "The dormant Commerce Clause, as the term 'dormant' implies, limits the powers of the States in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state activity." *Norfolk Southern Corp. v. Oberly*, 822

own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot*, 112 S. Ct. at 2023. A neutral regulation that imposes only an incidental burden on interstate commerce is valid as long as that burden is not "clearly excessive in relation to the putative local benefits" the regulation is designed to serve. *Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 780 (D.R.I.) (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991)). On the other hand, if the interference is nothing more than "economic protectionism," benefitting in-state economic interests at the expense of out-of-state competitors, the regulation is deemed unconstitutional *per se*. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity. Rather, Gray's Ordinance appears to pursue legitimate local goals, by gaining control of the waste stream and promoting recycling and energy recovery. The Ordinance, however, has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line. *Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641, 645 (D. Minn. 1992). Gray and RWC must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable,

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F.2d 388, 392 (3d Cir. 1987). *See New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (referring to the "negative aspect" of the Commerce Clause).

City of Auburn, No. 6625, slip op. at 13 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353) (1977)).

The entry is:

Judgment vacated. Remanded to the Superior Court for further proceedings consistent with the opinion herein.

All concurring,

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(2)

No. 93-1505

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TRI-STATE RUBBISH, INC.,
Petitioner,
v.
CITY OF AUBURN, MAINE and
MID-MAINE WASTE ACTION CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

RESPONDENTS' BRIEF IN OPPOSITION

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17 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE PRESENTED BY THE PETITION	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Background and Proceedings Below	2
REASONS FOR DENYING THE PETITION	3
I. THE PETITION FOR A WRIT OF CERTIORARI DOES NOT MEET THE REQUIREMENTS FOR JURISDICTION	4
II. THE PETITION CONTAINS NUMEROUS RELEVANT LEGAL AND FACTUAL ERRORS	6
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Department of Environmental Protection v. Emerson, 563 A.2d 762 (Me. 1989) 4
Ford New Holland v. Thompson Machine, Inc., 617 A.2d 540 (Me. 1992) 5
Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables Unlimited Services, Inc., U.S.S.C. Docket No. 93-1133.. 7
Tri-State Rubbish, Inc. v. Town of Gray, 632 A.2d 134 (Me. 1993) 2, 7, 8

STATUTES

Federal Statute
28 U.S.C.A. § 1257 (West 1993) 1, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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TRI-STATE RUBBISH, INC.,
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CITY OF AUBURN, MAINE and
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On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE ISSUE PRESENTED BY THE PETITION

Where Petitioner's appeal of the State trial court's issuance of a preliminary injunction is pending in the State Supreme Judicial Court, and Petitioner's Motion for Stay of the Injunction Pending Appeal is denied by the State Supreme Judicial Court, is the denial of the Motion for Stay reviewable by the United States Supreme Court?

JURISDICTION

There is no jurisdiction for the United States Supreme Court to address this case under 28 U.S.C.A. § 1257 (West 1993). The trial court's (the "Superior Court") decision to grant a preliminary injunction in this matter currently is on appeal to the Maine Supreme Judicial

Court (the "Law Court"), which as yet has neither received briefs nor argument in this matter. Thus, the Law Court has not rendered a final, appealable decision on the validity of the Superior Court's issuance of a preliminary injunction. The Superior Court, moreover, still has jurisdiction over the merits of the case upon a remand from the Law Court from which Petitioner took no appeal.

STATEMENT OF THE CASE

This case as currently postured does not present any substantive issues for this Court to resolve. In addition, the only procedural issue is whether the Law Court correctly denied Petitioner's Motion for Stay of Injunction Pending Appeal ("Motion for Stay") to the Law Court of the preliminary injunction granted to Respondents by the Superior Court. Since review of this issue could not reach the merits of this case, and no final judgment has been rendered, the Petition for Writ of Certiorari should be denied.

A. Background and Proceedings Below

On August 5, 1993, the Law Court upheld the Superior Court's granting of summary judgment to Respondents on all issues Petitioner raised below except Petitioner's Commerce Clause issue with respect to recyclable materials only. *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993) (Pet. App. 10a-25a). The case was remanded back to the Superior Court for further proceedings consistent with the Law Court opinion. Petitioner did not file a Petition for a Writ of Certiorari based upon the Law Court's decision.

Respondents subsequently sought a preliminary injunction to require Petitioner to comply with the City of Auburn Solid Waste Flow Control Ordinance ("Ordinance"). On February 8, 1994, after oral argument, the Superior Court entered an order granting Respondents'

Motion for Preliminary Injunction. (Pet. App. 2a-9a). Petitioner appealed the Superior Court's Preliminary Injunction and Order to the Law Court, and that appeal is currently pending. (Resp. App. 1a).

Petitioner then filed with the Law Court the Motion for Stay (of the preliminary injunction entered by the Superior Court). The Law Court denied Petitioner's Motion for Stay on February 15, 1994. (Pet. App. 1a). The Superior Court, in issuing the Preliminary Injunction and Order, has not entered a final decision in this case and the Law Court did not address the merits of this case at all in its denial of Petitioner's Motion for Stay.

REASONS FOR DENYING THE PETITION

The central reason for denying the Petition is that there has been no final judgment issued by the Law Court, Maine's highest court. This issue is discussed more thoroughly below. In addition, the Petition contains a number of factual and legal misstatements, some of which bear on this procedural flaw in the Petition, and some of which bear on the merits of this case, should the Petition be granted. Although there are a myriad of errors, only the most salient are discussed below.

1. Petitioner has not identified any appropriate issue for review by the United States Supreme Court and indeed there is none in this case. The only decision rendered by the State's highest court is the Law Court's denial of Petitioner's Motion for Stay, which is not a final decision. This Court is therefore deprived of jurisdiction in this matter.

2. The most relevant legal and factual errors in the Petition are discussed below.

I. THE PETITION FOR A WRIT OF CERTIORARI DOES NOT MEET THE REQUIREMENTS FOR JURISDICTION.

28 U.S.C.A. § 1257 states that only final judgments or decrees by a state's highest court may be reviewed by the United States Supreme Court. As described above, there is no final judgment in this case; currently pending before the State's highest court is Petitioner's appeal of the Preliminary Injunction and Order entered by the Superior Court. The only decision rendered in this case by the State's highest court, within ninety days prior to the Petition for Writ of Certiorari, is the Law Court's denial of Petitioner's Motion for Stay of the preliminary injunction.

The current status of this case presents the issue of whether the Superior Court's Preliminary Injunction and Order is a final judgment for purposes of review by the Law Court, and does not present an issue for this Court at this time. Whether Petitioner's appeal to the Law Court of the Superior Court's Preliminary Injunction and Order is proper as an exception to the final judgment rule will be an issue for the Law Court to decide under the criteria set out in *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 765-766 (Me. 1989) (which by no means stands for the proposition, as suggested by Petitioner, that all preliminary injunctions are final judgments). The appropriate forum for Petitioner's appeal of the Preliminary Injunction and Order is the Law Court where it currently is lodged and is subject to a briefing schedule. (Resp. App. 2a).

With regard to the denial of Petitioner's Motion for Stay, contrary to Petitioner's argument, *Department of Environmental Protection v. Emerson*, 563 A.2d 762 (Me. 1989) does not contain any law on this subject. Because Petitioner's appeal of the Preliminary Injunction and Order is pending before the Law Court, and because regardless of the outcome of that appeal, the case will be

tried on the merits before the Superior Court, there is no final judgment to appeal to this Court.

Moreover, the Law Court's denial of Petitioner's Motion for Stay is neither a final judgment nor does it fall within the recognized exceptions to the final judgment rule. Petitioner does not even suggest this to be the case. On this issue the Law Court "will not consider an appeal unless it derives from a final judgment or order, or unless, notwithstanding the lack of finality, it falls within a recognized exception to the final judgment rule." *Ford New Holland v. Thompson Machine, Inc.*, 617 A.2d 540, 541 (Me. 1992) (citation omitted). The Law Court has held that "an order of judgment is final if 1) the trial court's action fully decides and disposes of the whole matter leaving nothing further for the consideration and judgment of the trial court, and 2) no subsequent proceedings in the case will render the appellate court's decision immaterial." *Id.* (citation omitted). Here, because the merits will be tried in the future and subsequent proceedings could address the propriety of the preliminary injunction granted by the Superior Court, the Petition does not fall within a recognized exception to the final judgment rule.

When the Law Court issued its initial decision on August 5, 1993 in this case, Petitioner chose not to file a Petition for a Writ of Certiorari regarding any aspect of that case, such as the decision on the merits or the standards for review that were delineated for the case on remand. That decision is included in Petitioner's Appendix at 10a-25a. Now, Petitioner, unhappy with the recent Superior Court decision entering the Preliminary Injunction and Order and the denial by the Law Court of its Motion for Stay, apparently seeks to create a "final judgment" out of the injunction prior to a decision by the Law Court and thereby belatedly raise the issue of the applicable standard for Commerce Clause analysis. Petitioner apparently would have had the Law Court, in its

August 5, 1993 decision, hold that the Ordinance is facially discriminatory. The merits of this case and the standards for Commerce Clause analysis, however, are not before this Court and the Petition for a Writ of Certiorari should therefore be denied.

II. THE PETITION CONTAINS NUMEROUS RELEVANT LEGAL AND FACTUAL ERRORS.

In opposition to the Petition, Respondents point out that the Petition is fraught with legal and factual errors, the most relevant of which are included below:

a. In the Question Presented, Petitioner neglects to point out that the August 5, 1993 remand from the Law Court restricted future proceedings to recyclable materials only and not the whole solid waste stream. (Pet. App. 24a).

b. The August 5, 1993 Law Court opinion placed upon Petitioner the burden to prove the very fact it assumes to be part of the "background" stated on page 5 of the Petition (that Tri-State separates recyclable waste and sells it to brokers and recycling processors). Petitioner not only must demonstrate that it has the capacity to separate recyclables and deliver the remaining waste to a designated facility but also must specifically indicate the interstate recycling markets allegedly affected by the City of Auburn Solid Waste Flow Control Ordinance in question ("Ordinance") (Pet. App. 24a).[1]

c. Petitioner incorrectly states at page 5 of the Petition that it has been enjoined from its business as a result of the State court action brought by Respondents. Contrary to this assertion, under the terms of the Preliminary Injunction and Order, Petitioner may continue to collect

---

[1] The Superior Court, in issuing the Preliminary Injunction and Order, found that Petitioner failed to create any record for the court's review that it has the capacity to identify, separate and develop markets for recyclables. (Pet. App. 5a).

solid waste within the City of Auburn so long as it complies with the Ordinance. (Pet. App. 9a).

d. Petitioner incorrectly states the opinion of the Law Court with regard to the standard on remand in *Tri-State Rubbish, Inc. v. The Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993) (Pet. App. at 55a). Petitioner states at page 8 of the Petition that the Town of Gray and Regional Waste Systems, Inc. ("RWS") must demonstrate that there are "no other reasonable alternatives for the disposal of waste". By contrast, the Law Court stated that the Town of Gray and RWS must "show that reasonable alternatives to the *Ordinance* are unavailable." *Id.* (emphasis added).

e. Contrary to Petitioner's assertions on pages 9 and 19 of its Petition, neither the Law Court in its August 5, 1993 decision nor the Law Court in the decision in *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993), stated that flow control ordinances are facially discriminatory. (Pet. App. 10a-24a, 55a). Similarly, there was no finding by the Law Court in its August 5, 1993 decision that flow control ordinances are discriminatory *per se*, and the Law Court in *Tri-State Rubbish, Inc. v. The Town of Gray and Regional Waste Systems, Inc.*, specifically rejected any such notion. (Pet. App. 10a-24a, 55a).

f. Petitioner's allegations at page 10 of the Petition that "the status of this case" would present a substantial adverse impact upon it or cause irreparable injury are without substance. In fact, the Superior Court, in issuing the Preliminary Injunction and Order stated that the injunction "may have some adverse impacts on Defendant's finances . . . [but that] those impacts should not be any different than the impacts of the ordinance as applied to all other commercial trash haulers collecting trash within the City of Auburn." (Pet. App. 8a).

g. The Petition in *Town of Gray and Regional Waste Systems, Inc. v. Tri-State Rubbish, Inc. and Recyclables*

Unlimited Services, Inc., U.S.S.C. Docket No. 93-1133 can be distinguished from the Petition here since a timely Petition was filed from the final decision in *Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc.*, 632 A.2d 134 (Me. 1993), whereas a Petition was not filed from the initial August 5, 1993 decision in this case and there is no current final state court decision from which a Petition for Writ of Certiorari (or at least a Petition that raises the issue Petitioner seeks to address) may be filed.

h. Contrary to Petitioner's assertions on page 14 of its Petition, MMWAC represents a comprehensive, integrated approach to waste management that includes both waste disposal and recycling. (Pet. App. 17a).

i. On page 15 of its Petition, Petitioner asserts that "the EPA has recognized that flow control laws are counterproductive". In fact, the EPA has yet to make a decision on solid waste flow control and recently concluded a series of "town meeting" style forums around the country to assist it in reaching a conclusion.

j. Contrary to Petitioner's assertions on page 17 of its Petition, the Law Court did not find in either its August 5, 1993 decision or in *Tri-State, Inc. v. The Town of Gray*, 632 A.2d 134 (Me. 1993) that flow control laws are "protectionist measures". (Pet. App. 23a-25a and 55a-56a). In both instances, the cases were remanded to decide precisely this question among others.

k. Petitioner's assertion on page 17 of the Petition that the implication of the denial of its Motion for Stay is that the Law Court has adopted a different standard than previously enunciated with regard to Commerce Clause analysis is ludicrous. The Law Court never addressed either the merits of this case or the over-arching Commerce Clause issue in denying of Petitioner's Motion for Stay. (Pet. App. 1a). Petitioner is attempting to have this Court reach the merits of this case by asserting that the

denial of its Motion for Stay has constitutional implications and is a final judgment.

1. At page 20 of its Petition in the penultimate paragraph, Petitioner includes conclusory statements that go to the very heart of this case regarding the purpose of the Ordinance. Since these are the issues to be tried on remand, it is not only premature but irrelevant for Petitioner to include such statements at this juncture and they should be ignored.

CONCLUSION

For the reasons stated above, there is no final judgment in this case, the United States Supreme Court does not have jurisdiction to hear this matter and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF MAINE

ANDROSCOGGIN, ss.

SUPERIOR COURT

Civil Action Docket No. CV-90-561

CITY OF AUBURN, *et al.*,
Plaintiffs,

-versus-

TRI-STATE RUBBISH, INC.,
Defendant.

NOTICE OF APPEAL

Pursuant to M.R.Civ.P. 73(b), notice is hereby given that Tri-State Rubbish, Inc., the above named Defendant, hereby appeals to the Law Court from the Preliminary Injunction and Order granting the preliminary injunction, dated February 8, 1994, in favor of the Plaintiff and Plaintiff/Intervenor.

Dated: Portland, Maine
February 10, 1994

/s/ Ralph A. Dyer
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STATE OF MAINE
SUPREME JUDICIAL COURT
P.O. Box 368
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April 6, 1994

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RE: City of Auburn
vs.
Tri-State Rubbish, Inc.
Law Docket No. AND-94-108

Dear Counsel:

The record on appeal in the referenced matter became complete on April 5, 1994 following the filing of the original record and transcript.

The Appellant's brief and the appendix are due to be filed on or before May 23, 1994.

The Appellee's brief is due to be filed within 30 days after service of Appellant's brief.

A reply brief, which should be submitted in response to any new matter raised by Appellee's brief, is due to be filed by the Appellant within 14 days after service of Appellee's brief. Counsel are advised that the Court encourages the Appellant to file a reply brief when appropriate.

Please comply with the requirement that statutes be reproduced in the briefs, M.R.Civ.P. 75A(d).

If Counsel adhere to the above briefing schedule, this case will be in order for oral argument at the September term. Requests for preferences in scheduling cannot be met unless made at least 30 days in advance of the start

of the term. The term calendar is ordinarily mailed to counsel about 3 weeks in advance of the term.

/s/ James C. Chute
JAMES C. CHUTE
Clerk of the Law Court